Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

JOHN DOE, individually and on behalf of his minor children,

Petitioner,

v.

PAULA BENNETT and SHERYL GEORGE,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether state social service caseworkers are entitled to absolute or only qualified immunity in the performance of their duty to investigate complaints of child abuse?

2. Whether a child abuse caseworker's qualified immunity is overcome when she knowingly suppresses reports that indicate no sexual abuse had occurred; misrepresents to authorities her negative findings in those reports; obtains, in secret and through deception, a court order depriving Doe of the care and custody of his son; knowingly gives false information to the District Attorney's Office – all of which deception effectively denied Doe all contact with his children for four months?

3. Whether Doe's amended complaint states a constitutional claim for malicious prosecution and deprivation of clearly established Fourteenth Amendment familial and privacy rights cognizable in federal court under 42 U.S.C. Section 1983?

PARTIES

Petitioner John Doe is an unnamed resident of Jefferson Parish, Louisiana. He is the natural father and custodial parent of his two children, herein referred to only as Daughter and Son, ages 4 and 8 respectively at the time of the events complained of, on whose behalf Doe also petitions this Court. "To shield their identities, the complaint refers to the plaintiff father only as John Doe and to the children as Daughter and Son," U.S.D.C. E.D.La., Appendix, 37a n.2, *infra*.

Respondents Paula Bennett and Sheryl George are employees of the Louisiana Department of Social Services, Office of Community Services.

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JOHN DOE, individually and on behalf of his minor children,

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PAULA BENNETT and SHERYL GEORGE,

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

John Doe, individually and on behalf of his minor Daughter and Son, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this matter on October 4, 1993.

OPINIONS, JUDGMENTS, AND ORDERS BELOW

The October 4, 1993 opinion of the Fifth Circuit is reported at 2 F.3d 1412 and is reprinted herein, Appendix, 1a, *infra.* The Order denying Doe's motion to remand to

the District Court to supplement complaint is unreported and appears herein, App. 29a. The Order vacating the October 5, 1992 opinion of the Fifth Circuit is reported at 974 F.2d 39 and appears herein, App. 30a. The October 5, 1992 opinion of the Fifth Circuit is unreported and appears herein App. 31a, *infra*. Rehearing in the Fifth Circuit was denied on November 12, 1993, App. 56a. The January 31, 1992 Order and Reasons of the United State District Court for the Eastern District of Louisiana (Honorable Adrian Duplantier, J.) is unreported and appears herein, App. 37a, *infra*.

JURISDICTION

The judgment of the Fifth Circuit Court of Appeals was entered on October 4, 1993. The Fifth Circuit denied rehearing on November 12, 1993. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment XIV, § 1:

> "[N]or shall any state deprive any person of life, liberty, or property without due process of law . . . ."

42 U.S.C. § 1983:

> "Every person who, under color of any statute, ordinance, regulation, custom or usage of

> any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . . "

STATEMENT OF THE CASE

Petitioner John Doe is an unnamed resident of Jefferson Parish Louisiana. Respondents Sheryl George and Paula Bennett are Louisiana Office of Community Service ("OCS") employees who falsely accused Doe of sexually abusing his daughter and son. George and Bennett "failed to conduct an investigation in good faith and instead undertook to falsely, maliciously and recklessly pursue and prosecute plaintiff. Plaintiff was ultimately acquitted of all charges and it was judicially determined that his children had never been subjected to the abuse which defendants wrongfully attempted to establish." Complaint, Para. VI., App. 60a-61a.

Specifically, caseworker George and Supervisor Bennett "attempted to manipulate the children to give false evidence against the father, coerced the Mother, created false allegations and evidence, misused the Office of the District Attorney for the Parish of Jefferson, and practiced deception on all concerned," Amended Complaint, Para. XX., App. 68a-69a.

George arranged a videotape interview with Doe's daughter, age four at the time. The interviewer "repeatedly pressured the child in an effort to have her make false statements against her father and to put words in her mouth." *Id.* at XXI., App. 69a. George told the mother there was conclusive evidence of molestation by the father, but refused the mother's plea to see the tape. *Id.* When Doe's attorney requested the tape in the course of authorized discovery on the eve of the Juvenile Court adjudication in December, 1990, he was told that the tape did not exist. *Id.* "Only under the threat of a court order was the tape miraculously produced, viewed and made *defense* exhibit no. 1 at the adjudication." *Id.*

On Wednesday, August 8, 1990, the third day of the investigation, Dr. William Janzen, the OCS's hand-picked psychologist, interviewed and evaluated both the daughter and mother. He concluded there was no abuse. "Not only did George fail to disclose the results of this evaluation until the eve of the adjudication, when she was forced to produce the information in pre-adjudication discovery, but she repeatedly told the Mother that Dr. Janzen had not issued a report." Amended Complaint, Para. XXII., App. 70a.

At the outset of the investigation, which began on August 6, 1990, Doe's son was in North Carolina with his grandparents, cousins and other family members. "The actions of OCS with respect to the Son, who was not the subject of any charges, are among the most malicious and clearly violate the Son's constitutionally-protected privacy rights." Amended Complaint, Para. XXIII, App. 71a. George insisted that Doe have no contact by telephone or otherwise with either of his children. Doe complied.

Amended Complaint, Para. XXIV, App. 71a. It thus became logistically difficult to transport the son back to New Orleans from North Carolina since it was previously planned that Doe would join him on vacation and drive him back home. "The Uncle made known this logistical problem to George, as well as to Detective John Pinero of the Sheriff's Office, and *both* agreed to wait until August 27 to interview the Son in New Orleans. Immediately after making this agreement, George and her supervisor, defendant Paula Bennett, secretly wrote a letter to the 24th Judicial District Court in which they described the Son as a *victim* and identified their [*sic*] father as the alleged perpetrator. They mislead the 24th Judicial District Court with representations that the Son was in urgent danger, with the result that orders were issued; the Mother was dispatched to North Carolina where in the company of a local sheriff, the Son was suddenly and without warning snatched away from his family." Amended Complaint, Para. XXIV., App. 71a-72a.

"An expedited hearing was set before the Honorable Charles Cusimano of the 24th Judicial District Court, who had entered the orders regarding divorce and child custody the previous year. Judge Cusimano conducted an informal hearing, in which it became known, among other things, that the OCS case file contained at least one material factual misrepresentation. Although the OCS refused to release its file to anyone but Judge Cusimano, his questioning of Dr. Bagnetto, who was present at the hearing, enabled the Judge to conclude that the OCS file misrepresented Dr. Bagnetto's physical findings. Judge Cusimano entered new orders placing the custody of both children with the paternal grandparents." Amended

Complaint, Para. XXV., App. 72a. Previously, "[j]oint custody of their two children was awarded with Doe being the custodial parent. Thereafter, the children spent time with both of the parents who maintained separate residences." *Id.*, Para. XVII., App. 67a.

"The culposcopic examination of the Daughter was thereafter conducted. Although it was negative, George rejected the findings, describing them as 'inconclusive'. At the adjudication, the presiding judge held on the record that the results were not inclusive; they were *negative.*" Amended Complaint, Para. XXVII., App. 73a.

"In clear violation of the Son's right to privacy in his own person, George insisted that the Son undergo an invasive protoscopic examination, even though there was no indication whatsoever that the Son was a 'victim,'. His mother, Doe, the Uncle and custodial grandparents all pleaded that this sensitive eight-year old child not be subjected to the trauma of this procedure. However, George was insistent and the child was put through the ordeal of an examination by a physician who was openly hostile and abusive. Notwithstanding the shocking behavior of the OCS' physician, the test was negative for evidence of abuse." Amended Complaint, Para. XXVIII., App. 73a.

"Thereafter, George continued her invasion of the family unit and through manipulation and false statements, undertook to change the custody of the children from the Grandparents to the Mother. At the same time, OCS made threats to the Mother that her children would be placed in a foster home in another city if the Mother would not give evidence that children had been molested

by their father." Amended Complaint, Para. XXIX, App. 74a.

"The OCS was finally required to proceed to an adjudication of Doe on December 11, 1990. No physical evidence of abuse was presented, because none existed. Two child psychologists, including Dr. Janzen, who by that time had completed multiple sessions with the mother, Doe and children, opined that no abuse had ever occurred. The treating pediatrician testified that there had been no abuse and Dr. Bagnetto testified that, had he had a more complete medical picture of the Daughter's past treatment, a call to OCS would never have been made. George indicated under cross-examination that throughout the course of her 'investigation', she essentially chose to disregard facts which absolved Doe and instead pursued facts which might tend to incriminate him. She was also forced to concede that she was able to establish in her interviews with both children that neither had been subjected to 'bad touching'. Immediately after all testimony, the Judge dismissed the charges." Amended Complaint, Para. XXXII., App. 75a.

Thereafter, pursuant to 42 U.S.C. Section 1983, John Doe, individually and on behalf of his minor children, sued Bennett and George, "who are named individually and in their professional capacities as representatives of OCS." Complaint, Para. IV., App. 60a. All other state defendants were dismissed upon plaintiffs' concession of Eleventh Amendment immunity. Minute Entry, Duplantier, J., November 12, 1991, App. 50a n.1.

(a). *Plaintiffs' claims.* Doe's federal civil rights complaint sounds first in malicious prosecution:

"VIII.

> "The malicious actions of the defendants, including the commencement and continuance of the proceeding against plaintiff in the absence of probable cause render them liable to plaintiff on the grounds of malicious prosecution."

App. 61a. It is alleged that "the individuals employed by OCS have knowingly acted in bad faith in the conduct of their office and in the discharge of their official duties." *Id.*, Para. X., App. 62a.

Next, Doe's complaint couples George and Bennett's arbitrary abuse of their office with abridgment of plaintiffs' Fourteenth Amendment liberty and familial privacy rights:

"XIII.

> "The defendants violated the plaintiffs' fundamental liberty interest in the care, custody, and management of the minor children which is a protected Fourteenth Amendment right pursuant to *Santosky v. Kramer,* because the action of the defendants, as outlined below, sought to destroy the familial bonds without a fundamentally fair procedure and without sufficient basis in fact."

Amended Complaint, App. 66a (citation omitted). Doe further alleges that "the defendants were not objectively reasonable in constantly subjecting the Doe family to harassment, coercion and threats of permanent loss of custody, all in violation of the plaintiffs' Fourteenth Amendment Privacy Rights." Para. XVI., App. 67a. And more:

"XXXIII.

"George and her supervisor Bennett maliciously pursued an investigation and caused a prosecution to be made under circumstances where there was no justification to do so. In so doing, they intruded upon and violated the family unit and integrity, and caused injury to the father and his children, in violation of the plaintiffs rights to privacy and their fundamental liberty interest in their family unit. The tactics undertaken by the defendants failed to provide a fundamentally fair procedure, failed to protect the plaintiffs' interest in the accuracy of and justice of the proceeding, and was not objectively reasonable. The defendants' conduct clearly violated the plaintiffs privacy rights and liberty rights, recognized in the United States Constitution, including their rights under the Fourteenth Amendment to the Constitution."

Id., App. 76a.

On behalf of his daughter and son, Doe claims:

"XV.

"Further, the defendants violated the minor children's right to privacy by unreasonably subjecting them to invasive culposcopic and proctoscopic examinations in violation of their Fourteenth Amendment privacy rights."

Id., App. 66a.

(i). *Qualified immunity.* Paragraph XII. of Doe's Amended Complaint, App. 65a-66a, alleges: "the defendant government officials, including Ms. Bennett and Ms. George in their individual capacities, are not shielded from liability for civil damages, because their conduct

violated clearly established constitutional rights of which a reasonable person would have known."

(b) *District Court's decision.* Applying this Court's holdings in *Anderson v. Creighton,* 483 U.S. 635 (1987), and *Harlow v. Fitzgerald,* 457 U.S. 800 (1982), Judge Duplantier rejected the defense of qualified immunity, *viz.*:

> "In *Santosky v. Kramer,* 455 U.S. 745 (1982), the Supreme Court clearly established that the interest of natural parents in the care, custody, and management of their children is fundamental liberty interest protected by the due process clause of the fourteenth amendment. *See also Lassiter v. Department of Social Serv.,* 452 U.S. 18 (1981); *Stanley v. Illinois,* 405 U.S. 645 (1972). I recognize that the right to 'due process' is broad, and that the right that defendants are said to have violated 'must be "clearly established" in a more particularized . . . sense.' *Anderson,* 483 U.S. at 639. On the other hand, plaintiffs need not show that defendants' very actions have previously been held to be unlawful. *Id.* at 640. Defendants' liability turns on the 'objective legal reasonableness' of their actions: The contours of defendants' [*sic*] rights must have been sufficiently clear that a reasonable official would have understood that what she was doing violated those rights. *Id.* Reasonable officials conducting themselves in the manner that plaintiffs allege defendants did would have understood that they were violating plaintiffs' rights."

Order & Reasons, January 31, 1992 (U.S.D.C. E.D.La., Duplantier, J.), App. 42a-43a, *infra.*

The District Court reasoned (App. 43a-44a):

> "The activities described by plaintiffs afforded them anything but due process. Defendants misrepresented the contents of the tape recorded interview with Daughter and made misrepresentations about the existence of the tape itself. Defendant George denied that Dr. Janzen had rendered a report. In actuality, Dr. Janzen had concluded in a written report that Daughter had not been abused. George also misrepresented the results of Daughter's culdoscopic examination. Defendants misrepresented facts concerning abuse of Son to a judge and in so doing caused the judge to issue orders to have Son retrieved from North Carolina. At the informal hearing, the judge concluded that defendants' case file contained a material misrepresentation about Dr. Bagnetto's physical findings. George gave false information to the District Attorney's office in an effort to remove the children from the custody of the grandparents. At the adjudication, defendant George revealed that neither child had ever made any statement to her to establish that they had been abused, despite her prior assertions to the contrary. As a result of defendants' activities, plaintiffs were all subjected to unnecessary psychological and emotional damage, and the children were subjected to unnecessary physical examinations."

Citing the Fifth Circuit's holdings in *Hand v. Gary*, 838 F.2d 1420, 1424 (5th Cir. 1988), and *Sanders v. English*, 950 F.2d 1152, 1163 (5th Cir. 1992), the District Court announced: "There is a constitutional right to be free from bad faith prosecution, and such prosecution can be sufficient to support a damage judgment against state law

enforcement officials under section 1983." App. 44a. The District Court's legal analysis continues (App. 45a):

> "Defendants' bad faith maintenance of proceedings against Doe rises to the level of a constitutional tort as well, because under the facts alleged by plaintiffs, defendants violated their fundamental liberty interest in Doe's care, custody, and management of Daughter and Son, as the liberty interest is protected by the fourteenth amendment. Moreover, all plaintiffs sustained significant personal injury as a result of defendants' actions. All three sustained serious mental anguish, and the two children, serious physical invasions of their bodies as well."

And, by analogy, the District Court recited from this Court's opinion in *Brady v. Maryland*, 373 U.S. 83, 86 (1963):

> "[due process] cannot be deemed to be satisfied by mere notice and hearing if a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of the court. . . . [D]efendants did abuse the processes available to them and shielded the truth from plaintiffs and the court throughout the investigative process, until the time of the adjudication, thus depriving plaintiffs of liberty interests protected by the fourteenth amendment. If plaintiffs' allegations prove to be true, defendants' actions were not 'objectively legally reasonable;' their actions violated plaintiffs' clearly established constitutional rights."

App. 45a-46a (citations omitted).

The District Court concluded its legal analysis by following the Fifth Circuit rule of qualified, not absolute, immunity for child abuse caseworkers (App. 46a-47a):

> "Though we do not wish to restrict unduly the scope of child abuse investigations, we also do not wish to impinge on the 'most essential and basic aspect of familial privacy – the right of the family to remain together without the coercive interference of the awesome power of the state.' *Duchesne v. Sugarman*, 566 F.2d 817, 825 (2d Cir. 1977). We think that qualified immunity, not absolute immunity, strikes the better balance between these two concerns. As the Second Circuit has observed in reaching the same results in these circumstances, '[W]e think the strong emotional response provoked in anyone hearing an allegation of child abuse counsels against according an official absolute immunity for a taking in the wake of any and every such allegation, lest the official power itself become more likely to be abused. . . . ' *Robinson v. Via*, 821 F.2d 913, 920 (2d Cir. 1987)."

Hodorowski v. Ray, 844 F.2d 1210, 1216 (5th Cir. 1988).

Defendants' motion to dismiss on the basis of qualified immunity was thus denied by the District Court: "Plaintiffs' claims must proceed, because if their allegations prove to be true, defendants have abused their powers." App. 47a.

Defendants Bennett and George took an interlocutory appeal from the order denying them qualified immunity. App. 7a.

(c). *First Fifth Circuit decision.* A panel of the Fifth Circuit, on summary calendar, affirmed. Judge Thornberry, joined by Judges Davis and Smith, held (App. 34a):

> "John Doe's complaint does at least allege the violation of one clearly established constitutional right – the right to be free from bad faith and malicious prosecution. This single recognized constitutional right is sufficient to support plaintiff's complaint and allow him to prevail in defendant's motion to dismiss."

Citing *Hand v. Gary,* 838 F.2d 1420, 1427 (5th Cir. 1988), and *Sanders v. English,* 950 F.2d 1152, 1163 (5th Cir. 1992), which in turn quotes from *Goodwin v. Metts,* 885 F.2d 157, 162-163 (4th Cir. 1989), and *Jones v. City of Chicago,* 856 F.2d 985, 993 (7th Cir. 1988), Judge Thornberry concluded (App. 35a-36a):

> "Therefore, these decisions were in effect in Louisiana at the time of the alleged malicious prosecution. But whether or not defendants George and Bennett were aware of these cases is of no moment. Any reasonable state actor employed in a capacity which embraces law enforcement would surely realize that misrepresenting or concealing facts to judges or prosecutors is a violation of the accuseds' guaranteed rights under the United States Constitution."

Although noting that "John Doe's complaint also alleged with particularity a violation of the fundamental liberty interest in the care and management of his minor children," App. 34a, the Thornberry panel did not reach this issue: "We need not decide whether this alleges a constitutional violation." *Id.*

On petition for rehearing, the Fifth Circuit vacated its original opinion and set the case down for oral argument. 974 F.2d 39 (5th Cir. Dec. 17, 1992) (per curiam, Thornberry, Davis, and Smith, JJ.).

(d). *Second Fifth Circuit decision.* A new panel (per Emilio Garza, J., joined by District Judge Hall; King, J., concurring in the judgment) reversed. The majority and Judge King divide as to reasons. We recite their respective opinions separately.

(i). *Judge Garza's reasoning.* Although acknowledging the Fifth Circuit's rule that child care workers are entitled only to qualified, not absolute, immunity, App. 8a, the Majority rejects Doe's substantive due process, familial integrity, claim: "Although we agree with the plaintiffs that those three cases [*Santosky v. Kramer; Hodorowki; Frazier v. Bailey*, 957 F.2d 920 (1st Cir. 1992)] recognize a constitutional right of family integrity under the Fourteenth Amendment, we disagree that those cases establish that a parent's liberty interest in family integrity is a clearly established constitutional right." App. 10a (2 F.3d at 1416). "Given the absence of more fact-specific law, . . . we cannot conclude that the preexisting law establishes that George and Bennett should have known that their conduct violated the nebulous right of family integrity." App. 13a (2 F.3d at 1418) (footnote and citations omitted).

The Majority also rejects plaintiffs' malicious prosecution claim, citing, *inter alia, Albright v. Oliver*, 975 F.2d 343, 345-346 (7th Cir. 1992), *cert. granted*, 113 S. Ct. 1382 (1993) (stating that a claim of malicious prosecution alone, whether civil or criminal, does not constitute a

deprivation of liberty or property within the meaning of the due process clause and is therefore not actionable under § 1983). In the Fifth Circuit, "litigiousness which gives rise to a common law tort action for misuse of legal procedure may be so egregious as to constitute a violation of § 1983 as well, if the tort-feasor, under color of state law, subjects the tort-victim to a deprivation of constitutional dimension," *Beker v. Phospate Corp. v. Muirhead*, 581 F.2d 1187, 1189 (5th Cir. 1978). This is true, the Majority notes, App. 18a (2 F.3d at 1419-1420) in other Federal circuits as well: *Easton v. Sundram*, 947 F.2d 1011, 1017 (2d Cir. 1991) (holding that "[t]he misuse of the legal process must be so egregious as to work a deprivation of a constitutional dimension"), *cert. denied*, 112 S. Ct. 1943 (1992); *McMaster v. Cabinet for Human Resources*, 824 F.2d 518 (6th Cir. 1987) (holding that the defendants' alleged malicious prosecution did not violate a constitutional right because it did not "shock the conscience"). But "none of those cases even hint as to what constitutes such egregious conduct," the Majority reasons, App. 18a (2 F.3d at 1420), and therefore "it can hardly be said that in light of the law in 1990 that the unlawfulness of George's and Bennett's conduct was apparent." App. 19a (2 F.3d at 1420).

The Majority opinion specifically rejects Judge Duplantier's holding that George and Bennett's "bad faith maintenance of proceedings against Doe rises to the level of a constitutional tort . . . because . . . defendants violated [the plaintiffs'] fundamental liberty interest in Doe's care, custody, and management of Daughter and Son," App. 45a:

> "We, however, refuse to take a synergistic approach, and thus decline to find that the plaintiffs' claims of malicious prosecution and interference of family integrity, both of which were not clearly established constitutional rights at the time of the alleged unlawful conduct, taken together state a violation of a clearly established constitutional right."

App. 19a (2 F.3d at 1420).

Lastly, the Majority rejects plaintiffs' claim that Doe's son and daughter were unnecessarily subjected to proctoscopic and culdoscopic examinations in violation of their right to privacy under the Fourteenth Amendment:

> "Under Louisiana law, child care workers who have reason to believe that a child has been sexually abused may obtain a court order for a physical examination of the child. *See* La.Rev.Stat.Ann. § 14:403 Note (West Supp. 1993). We conclude that in light of pre-existing law, George and Bennett would not have known that their efforts to fulfill their public responsibility in determining whether sexual abuse occurred violated a constitutional right."

App. 20a (2 F.3d at 1420).

(ii). *Judge King's reasoning.* Judge King agreed with the holding that Bennett and George are entitled to qualified immunity as a matter of law. "Unlike the majority, however, I do not reach the question whether Doe has alleged the violation of a 'clearly established' constitutional right, as required by *Harlow v. Fitzgerald*," App. 21a (2 F.3d at 1421) (citation omitted). In Judge King's view,

> "Doe's allegations fail 'at an analytically earlier stage of the inquiry into qualified immunity.'

> *Siegert v. Gilley*, ___ U.S. ___, 111 S. Ct. 1789, 1791, 114 L.Ed.2d 277 (1991). Specifically, I would hold that Bennett and George are entitled to qualified immunity because Doe has not asserted the violation of a constitutional right at all. *See id.* at ___, 111 S.Ct. at 1793."

App. 21a (2 F.3d at 1421).

"Initially, I note that the allegations in Doe's amended complaint, if true, are 'nightmarish.' " *Id.* "That the actions of which Doe complains are egregious, however, does not mean that he has asserted the violation of a federally protected right, as required by 42 U.S.C. § 1983. After all, the gravamen of his complaint is malicious prosecution, a state tort law claim." App. 22a (2 F.3d at 1421).

According to Judge King, Doe's complaint raises only a procedural, not a substantive, due process claim: "I would construe his complaint as attempting to assert a procedural due process claim." App. 24a (2 F.3d at 1422). Given this reading of Doe's complaint,

> "The problem with Doe's procedural due process claim ultimately lies with his ability to demonstrate -- on the facts alleged – that he was deprived of custody of his children *without due process of law*. . . . Of course, when the state temporarily deprives a parent of custody of a child, it must provide a prompt post-deprivation hearing to ratify the emergency action. This is basically what occurred in Doe's case – at least if we accept his allegations as true. Although he temporarily lost custody of his children, the state court procedures ultimately exonerated

> him and, as a result, his liberty interest was restored."

App. 26a (2 F.3d at 1422-1423) (emphasis in original; citations omitted). Judge King adds:

> "Moreover, Louisiana law gives caseworkers like George and Bennett only good faith immunity in carrying out their investigative responsibilities. Given that Louisiana's procedures allow tort recovery for the sort of bad faith child abuse investigations at issue here, Doe simply cannot demonstrate that he was deprived of his liberty interest in the custody of his children without fundamentally fair procedures."

App. 27a (2 F.3d at 1423). "Thus, I would hold that, under *Siegert*, Doe has not asserted a violation of his right to due process of law." App. 28a.

(e). *Doe's Motion for Leave to Supplement Complaint.* On Oct. 18, 1993, Doe filed in the Fifth Circuit a Motion for Leave to Supplement Complaint, requesting that the Fifth Circuit remand the case to the district court to allow plaintiff to supplement his complaint as indicated, and that thereafter the appeal be considered upon the record as so supplemented. App. 78a, *infra*. At this time, the matter was pending in the Fifth Circuit upon Doe's Suggestion for Rehearing En Banc after the second panel's decision. The new specific facts sought to be pleaded by Doe were unknown to him at the time he amended his complaint, November 19, 1991. They were discovered only upon George's deposition testimony in state court proceedings. App. 83a. Doe sought leave to add the following supplemental allegations of specific fact unknown to him as of the date of his amended complaint, *viz.*:

"To Paragraph XX. add:

"On September 14, 1990 defendants George and Bennett knew the allegations of sexual abuse by Doe of his children were unsubstantiated, as indicated on their own OCS file and from reports received from Dr. Rebecca Russell and Dr. William Janzen. On the same September 14, 1990, George and Bennett, knowing there was no evidence of sexual abuse, referred the matter to the Jefferson Parish District Attorney's office for prosecution of Doe. Even though George had concluded in her own file that the charges were unsubstantiated, she knowingly concealed her findings from the District Attorney, Juvenile Court Judge McGee, and Judge Cusimano. Defendants' conduct was objectively unreasonable and outrageous, without any foundation in fact, and therefore violated clearly established Fourteenth Amendment substantive constitutional rights to family integrity and privacy of which a reasonable caseworker would have known.

"To Paragraph XXVIII. add:

"George referred Doe's son to Dr. James Pramberg for the proctoscopic examination on November 5, 1990, knowing the son was not a victim of sexual abuse. Dr. Pramberg conducted the examination, drew blood from the son's penis to test for venereal disease, and then concluded that no sexual abuse had occurred. George's conduct was objectively unreasonable and outrageous, without any foundation in fact, and therefore violated clearly established Fourteenth Amendment substantive constitutional rights to privacy and bodily integrity of which a reasonable caseworker would have known."

App. 78a-79a.

Rehearing in the Fifth Circuit was denied on November 12, 1993. App. 56a. Five days later, on November 17, 1993, Judges King, Garza, and Hall denied Doe's motion for leave to supplement complaint. App. 29a.

REASONS FOR GRANTING THE WRIT

1. We think it obvious that the second Fifth Circuit decision is not only dangerous to a falsely accused parent's liberty interest in the integrity of his family, but also quite inconsistent with this Court's analysis of qualified immunity in *Malley v. Briggs*, 475 U.S. 335, 341 (1986) ("Given malice and the lack of probable cause, the complainant enjoyed no immunity), and *Anderson v. Creighton*, 483 U.S. 635 (1987). Assuming, *arguendo*, that caseworkers such as Bennett and George enjoy only qualified immunity, a matter upon which there is a conflict among the Circuits, "The relevant question in this case, for example, is the objective (albeit fact specific) question whether a reasonable [caseworker] could have believed [George and Bennett's fabricated and lying pursuit of Doe] to be lawful, in light of clearly established law and the information [George and Bennett] possessed." *Anderson*, 483 U.S. at 641. We respectfully submit that Judge Duplantier and Judge Thornberry correctly answered this question with a blunt "No."

True, as noted by Judge Garza, "an interest in family integrity" must always be balanced against competing governmental interests in the health and welfare of children, App. 13a, quoting *Frazier v. Bailey*, 957 F.2d 920, 930-931 (1st Cir. 1992), but this required balancing hardly

means that a reasonable caseworker could have believed it to be lawful falsely to accuse Doe of child abuse, to suppress reports indicating that no sexual abuse had occurred, to misrepresent to authorities the nature of the reports' findings, and to lie to the District Attorney's office and to judges – all of which deception "effectively denied [Doe] all contact with his children for some four months." App. 22a.

The Majority opinion below is gravely in conflict with this Court's repeated holdings that have "by now made plain beyond the need for multiple citation" that a natural parent's "desire for and right to 'the companionship, care, custody, and management of his or her children' " is a clearly established constitutional liberty interest. *Santosky v. Kramer,* 455 U.S. 745, 758 (1982), quoting *Lassiter v. Department of Social Services,* 452 U.S. 18, 27 (1981) and *Stanley v. Illinois,* 405 U.S. 645, 651 (1972). This is precisely the substantive liberty interest invoked by Doe in his complaint.[1] To say that preexisting law fails to

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[1] See Amended Complaint, Paragraph XIII., App. 66a. Judge King, in her concurring opinion below, seeks to confine Doe's claims to malicious prosecution ("After all, the gravamen of his complaint is malicious prosecution, a state law tort claim," App. 22a), and procedural due process: "I would construe his complaint as attempting to assert a procedural due process claim." App. 24a (2 F.3d at 1422). With great respect, we think Doe's complaint speaks loudly to substantive due process, as the Majority below held: "Instead, plaintiffs made a substantive due process argument, claiming that George and Bennett, inter alia, withheld exculpatory evidence and fabricated evidence, thereby interfering with Doe's liberty interest in the care, custody, and management of his children." App. 10a n.9 (2 F.3d at 1416 n.9). And Judge King's confining Doe's claims to state

establish "that George and Bennett should have known that their conduct violated the nebulous right of family integrity," App. 14a, is to miss Orion.

"Clearly established," in the controlling *Anderson* sense, means that, "The contours of the right must be

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tort law and federal procedural due process is inconsistent with liberal construction of Section 1983 civil rights complaints:

> "But we see no basis for doling out constitutional protections in such a fashion. Certain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands. Where such multiple violations are alleged, we are not in the habit of identifying as a preliminary matter the claim's 'dominant' character. Rather, we examine each constitutional provision in turn."

Soldal v. Cook County, Ill., 113 S. Ct. 538, 548 (1992).

The specifics of Doe's Fourteenth Amendment claims also invoke this Court's teachings that: "So-called 'substantive due process' prevents the government from engaging in conduct that 'shocks the conscience,' *Rochin v. California*, 342 U.S. 165, 172 (1952), or interferes with rights 'implicit in the concept of ordered liberty,' *Palko v. Connecticut*, 302 U.S. 319, 325-326 (1937)." *United States v. Salerno*, 481 U.S. 739, 746 (1987). And more:

> "the Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.' *Daniels v. Williams*, 474 U.S., at 331. As to these two types of claims, the constitutional violation actionable under § 1983 is complete when the wrongful action is taken. *Id.*, at 338 (Stevens, J., concurring in judgments). A plaintiff, under *Monroe v. Pape*, may invoke § 1983 regardless of any state-tort remedy that might be available to compensate him for the deprivation of these rights."

Zinermon v. Burch, 494 U.S. 113, 125 (1990).

sufficiently clear that a reasonable official would understand that what [she] is doing violates that right." *Anderson,* 483 U.S. at 640. "The fact is that, regardless of the terminology used, the precise content of the Constitution's civil-liberties guarantees rests upon an assessment of what accommodation between government need and individual freedom is reasonable," *id.* at 643-644. The balancing required of officials whose immunity is only qualified imposes a duty upon them of "exercising reasonable professional judgment." *Malley v. Briggs,* 475 U.S. at 346. Only "[l]aw enforcement officers whose judgments in making these difficult determinations are objectively legally reasonable," *Anderson,* at 644, are immune. The Majority opinion below fails entirely to address these crucial questions.

We respectfully submit that the Fifth Circuit's second decision in this case "is in conflict with applicable decisions of this Court," SUP. CT. RULE 10.1(c), warranting certiorari.

2. *Albright v. Oliver,* No. 92-833, is currently pending before this Court. If Your Honors hold that malicious prosecution accompanied by egregious deprivation of constitutionally protected liberty interests is cognizable under 42 U.S.C. section 1983, then reversal is required here. *Accord, Vinson v. Campbell County Fiscal Court,* 820 F.2d 194 (6th Cir. 1987); *Doe v. Hennepin County,* 858 F.2d 1325, 1329 (8th Cir. 1988) (dictum); *Mahoney v. Kesery,* 976 F.2d 1054, 1060 (7th Cir. 1992) ("this seems the right place to be") (Posner, J.). Hence, we respectfully request that Doe's petition for writ of certiorari be held pending this Court's decision in *Albright.*

3. A conflict exists among the Circuits as to whether caseworkers such as Bennett and George are protected by absolute or only qualified immunity. See *Kurzawa v. Miller,* 732 F.2d 1456 (6th Cir. 1984) (absolute); *Salyer v. Patrick,* 874 F.2d 374 (6th Cir. 1989) (absolute); *Malachowski v. City of Keene,* 787 F.2d 704 (1st Cir. 1986) (absolute); *Meyers v. Contra Costa County Dept. of Social Serv.,* 812 F.2d 1154 (9th Cir. 1987) (absolute); *Coverdell v. Dept. of Social & Health Services,* 834 F.2d 758 (9th Cir. 1987) (absolute); *Vosburg v. Department of Social Services,* 884 F.2d 133 (4th Cir. 1989) (absolute); *contra, Duchesne v. Sugarman,* 566 F.2d 817 (2d Cir. 1977) (qualified); *Robinson v. Via,* 821 F.2d 913 (2d Cir. 1987) (qualified); *Meyers v. Morris,* 810 F.2d 1437 (8th Cir. 1987) (qualified); *Austin v. Borel,* 830 F.2d 1356 (5th Cir. 1987); *Hodorowski v. Ray,* 844 F.2d 1210 (5th Cir. 1988) (qualified); *Spielman v. Hildebrand,* 873 F.2d 1377 (10th Cir. 1989) (qualified).

This 4/4 split, upon a question of vital importance to parents throughout the country who have been falsely accused of abusing their own children,[2] should be resolved by this Court under SUP. CT. RULE 10.1(a). Thoughtful academic commentary has made the same

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[2] John Doe's petition here goes far beyond himself. *See generally,* Patterson, The Other Victim: The Falsely Accused Parent in a Sexual Abuse Custody Case, 30 J. Fam. L. 919 (1991-92). Professor Richard A. Gardner, Clinical Professor of Child Psychiatry at Columbia University, has documented institutional child sex-abuse hysteria – "hysteria in which an accused individual's constitutional due-process protections are commonly ignored." "Modern Witch Hunt – Child Abuse Charges," *Wall Street Journal,* Feb. 22, 1993, p. A-10.

plea. Sailer, Qualified Immunity for Child Abuse Investigators: Balancing the Concerns of Protecting Our Children From Abuse and the Integrity of the Family, 29 J. Fam. L. 659 (1990-91).

There can be no doubt that Bennett and George enjoyed only qualified immunity in the Fifth Circuit when they engaged in their nightmarish conduct, snaring Doe in their frightening witch hunt.[3] We think it plain that as early as Judge Gibson's admonition in *Meyers v. Morris*, 810 F.2d 1437, 1470 (8th Cir. 1987) (concurring opinion), child abuse prosecutors were put on notice to be careful, very careful, lest they deprive parents of clearly established liberty interests in the care and custody of their children:

> "if, as alleged, the prosecutor fabricated charges, coerced testimony, and withheld and destroyed evidence in pursuing the accusations against the plaintiffs, her conduct demeaned our system of justice and undermined the faith placed in that system by the people. . . . Child abuse cases should be handled cautiously from the investigative stage to the final stage, keeping in mind the rights of both the children and the parents. These child abuse cases were not handled in such a manner."

The rule of qualified immunity for such caseworkers in the Fifth Circuit, *viz.*, *Austin v. Borel*, 830 F.2d 1356,

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[3] *Cf.* the infamous oath "ex officio mero," by which Star Chamber judges summoned an accused before the Court by virtue of their office alone, without regard to the nature or the strength of the accusations against him. 8 J. H. Wigmore, Evidence in Trials at Common Law 275 (1961).

1363 (5th Cir. 1987); *Hodorowski v. Ray*, 844 F.2d 1210, 1217 (5th Cir. 1988), which governed Bennett and George's conduct in 1990, also requires caution among child abuse caseworkers. Whether that rule has been breached, appellate courts have made clear, always depends on the objective reasonableness of the caseworker's actions in the circumstances presented. *Hodorowski*, at 1217. *Accord, Robinson v. Via*, 821 F.2d 913, 922 (2d Cir. 1987); *Meyers v. Morris*, 810 F.2d at 1463 ("In our view, the parental interest in keeping the family unit intact is not a clearly established right *in the context of reasonable suspicion* that parents may be abusing their children" (emphasis added)). These decisions are faithful to Your Honors' analysis of qualified immunity in *Anderson* and faithful to common sense:

> "At the very least, the parents were entitled to demand that the State conduct a minimally adequate investigation before forcibly removing the children from the home. . . . Weight is added to appellants' due process claim by governmental reliance on what has been described charitably as 'exaggerated' allegations and on 'false inferences' by agency officials."

Doe v. Hennepin County, 858 F.2d 1325, 1330 (8th Cir. 1988) (Henley, J., concurring). The Fifth Circuit's second decision is not.

John Doe's case – to say nothing of the mindless proctoscopic examination of his Son at this petitioning stage[4] – painfully establishes the need for qualified, not

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[4] The Majority opinion below rejects Doe's Fourteenth Amendment claim, on behalf of his children, of unnecessary

absolute, immunity. "[J]udicial review ensures that government acts in this sensitive area with the requisite care." *Reno v. Flores*, ___ U.S. ___, 113 S. Ct. 1439, 1456 (1993) (O'Connor, J., joined by Souter, J., concurring). The Majority opinion below converts qualified immunity into an absolute barrier to judicial review that is faithless to the purpose of Section 1983, see *Zinermon v. Burch*, 494 U.S. 113, 124-125 (1990); ignores the well-pleaded specifics of Doe's amended complaint; and blinks at clearly established law: "[T]he Due Process Clause of the Fourteenth Amendment was intended to prevent government 'from abusing [its] power, or employing it as an instrument of oppression.' " *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 196 (1989) (quoting *Davidson v. Cannon*, 474 U.S. 344, 348 (1986)).

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proctoscopic and culdoscopic examinations of his son and daughter, saying that, "Under Louisiana law, child care workers who have reason to believe that a child had been sexually abused may obtain a court order for a physical examination of the child." App. 20a (2 F.3d at 1420). But this plainly begs the devastating allegations of Doe's amended complaint that there was no reason whatsoever to force these children to undergo these intrusive examinations. See, *e.g.*, Amended Complaint, Paragraph XXVIII., App. 73a.

George and Bennett's conduct, as specifically alleged in the amended complaint, was hardly an effort to fulfill public responsibility. To the contrary, the wanton insistence upon proctoscopic and culdoscopic examinations of Doe's son and daughter violated clearly established Fourteenth Amendment rights to bodily integrity and privacy. See, *e.g.*, *Winston v. Lee*, 470 U.S. 762 (1985). We expressly reserve the right to elaborate upon the merits of these contentions should this Court grant certiorari as to Question 3 of the petition.

CONCLUSION

The better rule of qualified immunity has been flagrantly violated here. Any reasonably cautious caseworker in 1990 would have known that concocting a false case of sexual abuse against Doe would deprive him of clearly established substantive liberty interests: the right of a father to the care and custody of his daughter and son free from baseless and knowingly false intrusion into his family's integrity and privacy. Certiorari on the egregious facts of Doe's case is imperative: "*Ex facto jus oritur.* That ancient rule must prevail in order that we may have a system of living law." *Adams v. Tanner,* 240 U.S. 590, 600 (1917) (MR. JUSTICE BRANDEIS, dissenting).

For the foregoing reasons, the petition for writ of certiorari should be held pending decision in *Albright v. Oliver*; thereafter certiorari should be granted, or, in the alternative, the judgment below should be summarily reversed and remanded for reconsideration in light of this Court's opinion in *Albright*.

Respectfully submitted,

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January 3, 1994

No. _____

In The

Supreme Court of the United States

October Term, 1993

JOHN DOE, individually and on behalf
of his minor children,

Petitioner,

v.

PAULA BENNETT and SHERYL GEORGE,

Respondents.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

APPENDIX

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John DOE, Individually and on behalf of his minor two children, Plaintiffs-Appellees,

v.

STATE OF LOUISIANA, et al., Defendants,

Paula Bennett and Sheryl George, Defendants-Appellants.

No. 92-3144.
United States Court of Appeals,
Fifth Circuit,

Oct. 4, 1993.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before KING and EMILIO M. GARZA, Circuit Judges, and HALL,[1] District Judge.

EMILIO M. GARZA, Circuit Judge:

Plaintiff John Doe, individually and on behalf of his two minor children, brought suit under 42 U.S.C. § 1983 (1988), claiming that their Fourteenth Amendment rights were violated by various state employees and entities during a child abuse investigation. The defendants filed for a motion to dismiss under Fed.R.Civ.P. 12(b)(6) on the basis of absolute and qualified immunity, which the district court granted as to all defendants, except for two. The two defendants appeal, contending that they are

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[1] District Judge of the Eastern District of Texas, sitting by designation.

entitled to qualified immunity. Finding that the district court erred, we reverse.

I

The following is a summary of the facts alleged in the complaint, which for purposes of a Rule 12(b)(6) motion are taken as true. *See Jefferson v. Yaleta Indep. School Dist.*, 817 F.2d 303, 304 (5th Cir.1987). Doe and his wife (the "mother") were divorced and both were granted joint custody of their two minor children (referred to as the "daughter" and the "son"), with Doe remaining as custodial parent. The daughter and son[2] spent time with both parents. The mother took the daughter to Dr. Richard Bagnetto, a pediatrician, for a routine physical examination. Dr. Bagnetto noticed that the daughter had a vaginal irritation, and asked the mother whether it possible that the child had been sexually abused. The mother said that there was some possibility of sexual abuse because the daughter did not live with her all of the time. Dr. Bagnetto referred the daughter to Children's Hospital for a culdoscopic examination to determine whether the irritation was the result of sexual abuse.[3] As required by state law,[4]

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[2] The daughter was four years of age and the son was eight years of age during the relevant period.

[3] Plaintiffs contend that unbeknownst to Dr. Bagnetto, the daughter had a recurring yeast infection over the past several months, which another pediatrician had diagnosed and treated. The treating pediatrician attributed the condition to the daughter's poor hygiene and obesity.

[4] "Any mandatory reporter who has cause to believe that a child's physical or mental health or welfare is endangered as a result of abuse or neglect or sexual abuse . . . shall" make a

Dr. Bagnetto then notified the Louisiana Department of Social Services Office of Community Services ("OCS") of the suspected abuse.

Pursuant to its statutory mandate,[5] the OCS immediately began a four month investigation on August 6, 1990. Sheryl George, an OCS caseworker, and Paula Bennett, an OCS supervisor, were assigned to investigate and evaluate the charges. George insisted that Doe have no contact with his two children, and he complied. After interviewing the daughter outside of the mother's presence and having the daughter play with anatomically correct dolls, George informed the mother that the daughter had been sexually abused. The Jefferson Parish Sheriff's office then interviewed the daughter outside of the mother's presence. The interview was videotaped. Immediately after the interview the mother was informed that the videotape provided conclusive evidence of sexual abuse. Subsequently, the mother asked to view the tape, but was informed that no tape existed. When she said that she knew a tape existed, the mother was simply told that she could not see it and was ordered to say nothing about it.[6]

"report immediately to the local child protection unit of the Department of Health and Human Resources and, if necessary, to a local or state law enforcement agency." La.Rev.Stat.Ann. § 14:403 Note (West Supp. 1993).

[5] *See* La.Rev.Stat.Ann. § 14:403 Note (West Supp.1993).

[6] The plaintiffs failed in their amended complaint to identify the party or parties who gave the mother and the attorney the information about the existence of the videotape.

On the third day of the investigation, Dr. William Janzen, a psychologist who was selected by the OCS, interviewed and evaluated the daughter and the mother. He concluded that there was no evidence of sexual abuse. George told the mother that Dr. Janzen did not make a report of his findings.

When the investigation commenced, the son was in North Carolina with his paternal grandparents. George was informed that Doe was supposed to join the son and drive him back to New Orleans. Both George and Detective John Pinero of the Jefferson Parish Sheriff's Office agreed to wait for a few weeks to interview the son in New Orleans. George and Bennett secretly wrote to the 24th Judicial District Court and described the son as a victim of sexual abuse, identified the father as the alleged perpetrator, and described the son as being in urgent danger. As a result, court orders were issued and the mother went to North Carolina where, in the company of a local sheriff, she took legal custody of the son and took him back to New Orleans.

Subsequently, an informal expedited custody hearing was conducted by the 24th Judicial District Court judge who had presided over Doe's and the mother's divorce and custody proceedings. The judge determined that the OCS case file misrepresented Dr. Bagnetto's physical findings and, therefore contained at least one material factual misrepresentation. The judge placed both the daughter and son in the custody of their paternal grandparents. Thereafter, George and Detective Pinero interviewed the son, but refused to videotape the interview or allow an independent child psychologist to be present. George stated that the interview was inconclusive.

George also insisted that the son undergo a proctoscopic examination, despite his parents' objections. The examination failed to produce evidence of sexual abuse. Subsequently, based on information provided by George, the District Attorney commenced a civil child-in-need-of-care proceeding.

Thereafter, George falsely informed the District Attorney that the grandparents would not allow the daughter to attend group counseling, in an effort to change custody from the grandparents to the mother. George then commenced an unjustified investigation of abuse of the daughter and son by the grandparents, which was abandoned when Doe's counsel intervened. In addition, OCS threatened the mother that the children would be placed in a foster home in another city if she did not give evidence that the children were sexually abused by Doe.

The hearing in the child-in-need-of-care proceeding was held about four months after the investigation had begun. The eve before the hearing, Doe's attorney requested the videotape of the daughter's interview, but was told that the tape did not exist. Under threat of court order, however, the tape was produced. The tape contained no proof that Doe sexually abused his daughter. George also produced the information contained in Dr. Janzen's report. No evidence of physical abuse was presented at the hearing; two psychologists, including Dr. Janzen, opined that no abuse had occurred. The treating physician testified that there had been no abuse. In addition, George admitted that the son had never made a statement to her to establish that either child had been

sexually abused. Furthermore, although George had represented during the investigation that the culdoscopic examination of the daughter was inconclusive, the judge stated that the result of the exam was negative, and not inconclusive. The judge dismissed the charges against Doe immediately after the hearing.

Subsequently, the plaintiffs brought this action pursuant to 42 U.S.C. §§ 1983, 1988 and the Fourteenth Amendment. The plaintiffs claimed that the defendants[7] attempted to manipulate the children to give false evidence against Doe, coerced the mother, created false evidence, withheld and ignored exculpatory evidence, and made misrepresentations to the mother and two judges and the District Attorney, and thereby interfered with the plaintiffs' right to family integrity under the Fourteenth Amendment. The plaintiffs also alleged that the defendants pursued the investigation of Doe despite the lack of evidence of sexual abuse, in violation of Doe's Fourteenth Amendment right to be free from malicious prosecution. In addition, the plaintiffs claim that the defendants violated the children's Fourteenth Amendment right to privacy by subjecting them to culdoscopic and proctoscopic examinations.

The defendants filed a motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim or cause of action upon which relief could be granted on

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[7] Besides Bennett and George, the plaintiffs brought suit against the State of Louisiana, the Department of Social Services, the Office of Community Services ("OCS"), Maynerva Nelson, in her capacity as Secretary, and Brenda Kelley, in her capacity as Assistant Secretary.

the ground that the defendants were entitled to absolute and/or qualified immunity. The district court granted the motion as to all defendants, except Bennett and George. The district court found that Bennett and George were not entitled to qualified immunity, because the plaintiffs' complaint alleged facts which indicated that Bennett and George violated clearly established statutory constitutional rights of which a reasonable person would have known. In denying the motion to dismiss as to George and Bennett, the district court found that "[d]efendants' bad faith maintenance of proceedings against Doe rises to the level of a constitutional tort . . . because under the facts alleged by plaintiffs, defendants violated their fundamental liberty interest in Doe's care, custody, and management of Daughter and Son, as that liberty interest is protected by the fourteenth amendment." Record on Appeal at 23. Bennett and George bring this interlocutory appeal of the order denying them qualified immunity.

II

The plaintiffs' complaint alleged that George and Bennett (1) interfered with Doe's fundamental liberty interest in the care and custody of his children, (2) violated Doe's constitutional right to be free from malicious prosecution, and (3) violated the children's right to privacy. George and Bennett argue that the plaintiffs have failed to show the violation of clearly established constitutional rights, and therefore have not overcome their defense of qualified immunity. The complaint may not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his [or her] claim which would entitle him [or her] to relief." *Chrissy*

F. By Medley v. Mississippi Dept. of Public Welfare, 925 F.2d 844, 846 (5th Cir.1991) (quoting *Conley v. Gibson*, 355 U.S. 41, 45, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957)). The same is true when immunity is urged in a motion to dismiss. *Id.*

Child care workers are entitled to qualified immunity in the performance of discretionary, nonprosecutorial functions. *Stem v. Ahearn*, 908 F.2d 1, 5 (5th Cir.1990), *cert. denied*, 498 U.S. 1069, 111 S.Ct. 788, 112 L.Ed.2d 850 (1991); *Hodorowski v. Ray*, 844 F.2d 1210, 1216 (5th Cir.1988); *Austin v. Borel*, 830 F.2d 1356, 1363 (5th Cir.1987). "Qualfied immunity shields only that conduct not violative of clearly established rights of which a reasonable person would have known." *Austin*, 830 F.2d at 1355. The Supreme Court has stated:

> [T]he right the official is alleged to have violated must have been 'clearly established' in a . . . particularized . . . sense: *The contours of the right must be sufficiently clear that a reasonable official would understand that what he [or she] is doing violates that right.* This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful . . . ; but it is to say that in light of preexisting law the unlawfulness must be apparent.

Anderson v. Creighton, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987) (emphasis added); see also *Hodorowski*, 844 F.2d at 1217. *Anderson* requires that we focus on the law existing at the time of the alleged

violation to determine whether or not a clearly established constitutional right was violated.[8] *Melear*, 862 F.2d at 1184 n. 8; *see also Frazier v. Bailey*, 957 F.2d 920, 929 (1st Cir.1992) (stating that "a court may not find that the right was established through the use of hindsight"); *see also Landstrom v. Ill. Dept. of Children & Family Servs.*, 892 F.2d 670, 675 (7th Cir.1990) (stating that questions of qualified immunity turn on the status of legal norms and not the sufficiency of the factual allegations).

A

George and Bennett argue that a parent's substantive due process liberty interest in the right to the care and custody of his or her child was not a clearly established constitutional right at the time of the alleged violation.

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[8] In examining preexisting law,

> [a]s a general proposition, we will not rigidly define the applicable body of law in determining whether relevant legal rules were clearly established at the time of the conduct at issue. *See Harlow v. Fitzgerald* [457 U.S. 800 at 818, n. 32], 102 S.Ct. [2727] at 2738, n. 32 [73 L.Ed.2d 396]. Relying solely on Fifth Circuit and Supreme Court cases, for example, would be excessively formalistic, but they will loom largest in our inquiries. In determining what the relevant law is, then, a court must necessarily exercise some discretion in determining the relevance of particular law under the facts and circumstances of each case, looking at such factors as the overall weight of authority, and the status of the courts that render substantively relevant decisions, as well as the jurisdiction of the courts that render substantively relevant decisions.

Melear v. Spears, 862 F.2d 1177, 1184 n. 8 (5th Cir.1989).

The plaintiffs argue to the contrary.[9] Both the plaintiffs and defendants cite to *Santosky v. Kramer,* 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982), *Hodorowski, and Frazier.*

Although we agree with the plaintiffs that those three cases recognize a constitutional right of family integrity under the Fourteenth Amendment, we disagree that those cases establish that a parent's liberty interest in family integrity is a clearly established constitutional right. While the Supreme Court has recognized that parents have an abstract liberty interest in the care and management of their children, the Court has never found that interest to be absolute or unqualified. *Watterson v. Page,* 987 F.2d 1, 8 (1st Cir.1993); *Frazier,* 957 F.2d at 929-30. After reviewing relevant case law, we conclude that plaintiffs failed to show that George and Bennett violated a constitutional right that is sufficiently "particularized . . . [so] that a reasonable official would understand that what he or she is doing violate[d] that right."

In *Santosky,* child care workers sought to permanently terminate the parents' custody of their children. *See id.,* 455 U.S. at 751, 753, 102 S.Ct. at 1393-95. The Supreme Court held that a state cannot permanently sever the parent-child relationship without providing

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[9] Plaintiffs did not allege that the procedures provided under Louisiana law, concededly followed in the instant case, were constitutionally inadequate, *See* Brief for Plaintiff's at 22, 24. Instead, plaintiffs made a substantive due process argument, claiming that George and Bennett, inter alia, withheld exculpatory evidence and fabricated evidence, thereby interfering with Doe's liberty interest in the care, custody, and management of his children.

parents with "fundamentally fair procedures." *Id.*, 455 U.S. at 754, 102 S.Ct. at 1395.

In *Hodorowski*, the plaintiffs argued that child protective service workers were not entitled to qualified immunity, because the workers interfered with their right to family integrity under the Fourteenth Amendment by removing the children from their parents' home without a prior court order. *Id.*, 844 F.2d at 1212. We rejected the plaintiffs' procedural due process argument, concluding that *Santosky* was distinguishable due to the state's attempt in that case to permanently deprive parents of custody while the instant case involved a temporary deprivation. *See Hodorowski*, 844 F.2d at 1217. In doing so, we stated that "it would be a mistake to conclude that, from *Santosky* . . . alone, the appellants should have known that taking the Hodorowski children into temporary custody violated a constitutional right." *Id.* at 1217. In reaching that conclusion, we noted the nebulous nature of the right to family integrity, and held that that right was not sufficiently particularized that a reasonable officer would understand that his or her conduct violated that right. We further stated:

> An important consideration in deciding whether an official violated clearly established law is the generality of the relevant rule. . . . [M]any general constitutional rights, such as the right to due process of law, are clearly established and yet so general that it often will be unclear whether particular conduct violates the right. . . .
>
> The district court held that appellants were not protected by qualified immunity because they violated the clearly established right of

> 'family integrity.' We think the district court's formulation of the right was too general. It is beyond dispute that many aspects of family integrity possess constitutional stature. But reasonable government officials, knowing only that they must not infringe on family integrity, would not necessarily know just what conduct was prohibited. In particular, in the absence of more fact-specific authority, we do not think that appellants in this case should have known that their conduct in removing the Hodorowski children from the home violated the nebulous right of family integrity.

Id. (citation omitted) (footnote omitted). In conclusion, we held that the child care workers violated no clearly established constitutional right. *See id.* at 1217.

In *Frazier*, a case involving facts and allegations similar to those in this case, the First Circuit also emphasized that the contours of the right to family integrity are not well-defined.[10] There the plaintiff alleged that a child care social worker interfered with his constitutional liberty interest in the care, custody, and management of his children by ignoring exculpatory evidence and by programming his children to falsely accuse him of sexual abuse during the course of an investigation of the plaintiff for the alleged sexual abuse of his two children. *See Frazier*, 957 F.2d at 925, 929. The First Circuit discussed in length whether the child care worker had violated a clearly established right of family integrity. In doing so,

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[10] Although *Frazier* was decided two years after the alleged violation, the state of the law in 1992 as explained by the First Circuit did not differ from the state of the law at the time of the alleged unconstitutional conduct.

the First Circuit noted that courts have experienced difficulty in finding a clearly established constitutional right in the context of family relationships. *See id.* at 930 (citing *Hodorowski*). The First Circuit explained that this was due to "(1) the difficulty of alleging a right with sufficient particularity, and (2) the qualified nature of the rights in this area." *Id.* The First Circuit then stated that is not enough for a plaintiff to "allege an abstract due process liberty interest in family relationships." *Id.* Pointing out that courts have emphasized the nebulous nature of a liberty interest in familial relationships, the First Circuit stated that because an interest in family integrity "must always be balanced against the governmental interest [in the health, education, and welfare of children as future citizens], it is difficult, if not impossible, for officials to know when they have violated 'clearly established' law." *Id.* at 930-31. The First Circuit concluded that "the dimensions of [the] right [to family integrity] have yet to be clearly established." *Id.* at 931. Thus, the First Circuit held that the plaintiff failed to show that the child care worker's conduct violated the amorphous right of family integrity, and that therefore the child care worker was entitled to qualified immunity as a matter of law. *See id.*

Given the absence of more fact-specific law,[11] and in light of *Hodorowski, Santosky* – both procedural due process cases – and *Frazier,* we cannot conclude that the

[11] We recognize, however, that "[i]t is not necessary to point to a precedent which is factually on all-fours with the case at bar. It suffices that the [defendant] be aware of general, well-developed legal principles." *Jefferson,* 817 F.2d at 305 (footnote omitted). In this case, however, we cannot discern any well-developed legal principles of which George and Bennett should have been aware.

preexisting law establishes that George and Bennett should have known that their conduct violated the nebulous right of family integrity.[12] Therefore, as a matter of law, George and Bennett did not violate a constitutional right that was clearly established at the time of the alleged conduct.[13]

B

George and Bennett next allege that they did not violate a clearly established Fourteenth Amendment right to be free from malicious prosecution. The plaintiffs claimed that George and Bennett continued the investigation and child-in-need-of-care proceeding initiated by the District Attorney after it was clear that there was no evidence to support the allegation that Doe sexually abused his children. The plaintiffs' contention essentially asserts the common law tort of malicious prosecution. The issue confronting us is whether, and under what circumstances, malicious prosecution might rise to the level of a constitutional violation for which § 1983 provides a remedy.

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[12] Although there may have been some wrongdoing, "immunity that applies only when the defendant did no wrong is no immunity at all." *Millspaugh v. County Dept. of Public Welfare of Wabash County*, 937 F.2d 1172, 1175 (7th Cir.), *cert. denied*, ___ U.S. ___, 112 S.Ct. 638, 116 L.Ed.2d 656 (1991).

[13] Although plaintiffs allege malice and wrongdoing, that allegation fails to transform the liberty interest in family integrity into a clearly established constitutional right. *See Siegert v. Gilley*, ___ U.S. ___, ___ -___, 111 S.Ct. 1789, 1793-94, 114 L.Ed.2d 277 (1991).

Although the alleged malicious prosecution occurred in a civil custody proceeding and a civil child-in-need-of-care proceeding, the plaintiffs argue that the underlying proceedings should be considered quasi-criminal because Doe could have been criminally prosecuted and was advised of his Fifth Amendment rights at the child-in-need-of care adjudication. The circuits are divided on whether malicious prosecution alone constitutes a constitutional violation where the underlying proceeding was criminal. In *Wheeler v. Cosden Oil & Chemical Co.*, 734 F.2d 254 (5th Cir.), *modified on reh'g on other grounds*, 744 F.2d 1131, 1133 (5th Cir. 1984), we concluded that the Fourteenth Amendment requires States to make a determination of probable cause before prosecuting, and therefore held that an allegation of malicious prosecution alone is actionable under § 1983. *See id.* at 260, *see also Sanders v. English* 950 F.2d 1152, 1163 (5th Cir.1992); *Hand v. Gary*, 838 F.2d 1420, 1424-26 (5th Cir.1988). However, most courts have held that the tort of malicious prosecution alone does not implicate constitutionally protected rights, and therefore is not actionable under § 1983 where the underlying proceeding was criminal. *See, e.g., Albright v. Oliver*, 975 F.2d 343, 345-46 (6th Cir.1992), cert. granted, ___ U.S. ___, 113 S.Ct. 1382, 122 L.Ed.2d 757 (1993) (stating that a claim of malicious prosecution alone, whether civil or criminal, does not constitute a deprivation of liberty or property within the meaning of the due process clause and is therefore not actionable under § 1983); *Smith v. Mass. Dept. of Corrections*, 936 F.2d 1390, 1402 (1st Cir.1991) (stating that a claim of malicious prosecution alone does not state an actionable claim under § 1983); *Gunderson v. Schluster*, 904 F.2d 407, 409 (8th Cir.1990)

("[M]alicious prosecution can form the basis for a section 1983 action only if the defendants' conduct . . . infringes some provision of the Constitution or federal law."); *Coogan v. City of Wixom*, 820 F.2d 170, 175 (6th Cir.1987) (stating that only when malicious prosecution is so egregious as to constitute a deprivation of constitutional dimension does § 1983 provide a remedy).

Plaintiffs argue that because the underlying proceedings were quasi-criminal we should find that their allegation of malicious prosecution alone sufficiently states a constitutional violation that is actionable under § 1983. We reject the plaintiff's argument. It is entirely speculative whether Doe would have been criminally prosecuted for child abuse. We find no authority for and decline to hold that the mere possibility of criminal prosecution converts an otherwise civil proceeding into the equivalent of a criminal proceeding for purposes of determining whether a constitutional right was violated.[14] Therefore,

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[14] The plaintiffs' argument that this case involved quasi-criminal proceedings because Doe was informed of his Fifth Amendment rights is to no avail, for a witness may properly invoke the Fifth Amendment "privilege against compulsory self-incrimination . . . 'in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory' when he [or she] 'reasonably apprehends a risk of self-incrimination, . . . though no criminal charges are pending against him [or her], . . . and even if the risk of prosecution is remote.' " *In Re Corrugated Container Anti-Trust Litigation*, 620 F.2d 1086, 1091 (5th Cir.1980) (quoting *Wehling v. Columbia Broadcasting System*, 608 F.2d 1084, 1087 n.5 (5th Cir.1979) and *Kastigar v. United States*, 406 U.S. 441, 444, 92 S.Ct. 1653, 1656, 32 L.Ed.2d 212 (1972)), *cert denied*, 449 U.S. 1102, 101 S.Ct. 897, 66 L.Ed.2d 827 (1981).

we refuse to apply *Wheeler* and its progeny to this case. Thus we must now determine whether and when a claim of malicious prosecution is actionable under § 1983 where the underlying proceeding was civil.

It is unclear when the tort of malicious prosecution states a claim for denial of civil rights under § 1983 where the malicious prosecution occurred in a civil proceeding. Even assuming that the plaintiffs' allegations support the common law tort of malicious prosecution, we stated in *Beker Phospate Corp. v. Muirhead*, 581 F.2d 1187 (5th Cir.1978), that "[t]he common law tort of misuse of legal procedure, without more, does not give rise to the level of constitutional wrong remedied by Section 1983."[15] *Id.*, 581 F.2d at 1189; *Cloutier v. Town of Epping*, 714 F.2d 1184, 1190 (1st Cir.1983). However, we concluded that a claim of malicious prosecution may state a constitutional violation in some instances: "litigiousness which gives rise to a common law tort action for misuse of legal procedure may be so egregious as to constitute a violation of § 1983 as well, if the tort-feasor, under color of state law, subjects the tort-victim to a deprivation of constitutional dimension." *Beker*, 581 F.2d at 1189; *see also Sisk*, 868 F.2d at 162 (holding that defendants' initiation of civil proceedings was not "egregious" misuse of legal process and that therefore defendants were entitled to qualified immunity); *Whatley v. Philo*, 817 F.2d 19, 22 (5th Cir.1987)

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[15] We have described "misuse of legal procedure" as "encompassing three separate but related common law torts which protect the interest in freedom from unjustified litigation: (1) malicious prosecution; (2) wrongful civil proceedings; and (3) abuse of process." *Sisk v. Levings*, 868 F.2d 159, 161 (5th Cir.1989).

(holding that plaintiff failed to show that defendants' alleged abuse of legal process violated a clearly established constitutional right, because "[a]t most, *Beker* supports the proposition that, to be actionable under § 1983, the misuse of legal process must be 'egregious' "); *Easton v. Sundram*, 947 F.2d 1011, 1017 (2d Cir.1991) (holding that "[t]he misuse of the legal process must be so egregious as to work a deprivation of a constitutional dimension"), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1943, 118 L.Ed.2d 548 (1992); *McMaster v. Cabinet for Human Resources*, 824 F.2d 518 (6th Cir. 1987) (holding that the defendants' alleged malicious prosecution did not violate a constitutional right because it did not "shock the conscience").

Although the above-cited cases indicate that a civil malicious prosecution claim may give rise to a constitutional claim where egregious conduct is present, none of those cases even hint as to what constitutes such egregious conduct. We have found only two cases where the court found that the plaintiffs' claim of misuse of legal procedure in a civil proceeding stated a constitutional violation because the defendants' conduct was so egregious. In *Vinson v. Campbell County Fiscal Court*, 820 F.2d 194 (6th Cir.1987), a mother's children had been removed from her custody in Ohio by a Kentucky juvenile services probation officer after it was determined that the mother's children were truant from their schools in Kentucky. *Id.* at 196-97. The mother brought a civil rights actions against the probation officer, alleging abuse of process. *See id.* at 200. The court found an egregious abuse of governmental power sufficient to state a claim under § 1983. *See id.* at 201. In *Cole v. Johnson*, 861 F.2d 943 (6th Cir.1988), the defendant, a prison official, planted

drugs on the plaintiff, a prison inmate, for retaliatory purposes. Because the plaintiff was subject to the possibility of disciplinary actions and a resulting loss of liberty, the Sixth Circuit held that the defendant's alleged conduct constituted an egregious abuse of governmental power, and that therefore the plaintiff's abuse of power claim adequately stated a constitutional claim that was actionable under § 1983. Despite the holdings of those two cases, it can hardly be said that in light of the law in 1990 that the unlawfulness of George's and Bennett's conduct was apparent. Consequently, "there was no clearly established constitutional counterpart to an action for malicious prosecution." *Santiago v. Fenton*, 891 F.2d 373, 388 (1st Cir.1989).

Nonetheless, the district court found that George and Bennett's "bad faith maintenance of proceedings against Doe rises to the level of a constitutional tort . . . because . . . defendants violated [the plaintiffs'] fundamental liberty interest in Doe's care, custody, and management of Daughter and Son." Record on Appeal at 23. We, however, refuse to take a synergistic approach, and thus decline to find that the plaintiffs' claims of malicious prosecution and interference of family integrity, both of which were not clearly established constitutional rights at the time of the alleged unlawful conduct, taken together state a violation of a clearly established constitutional right.

C

Lastly, George and Bennett contend that they violated no clearly established constitutional right by having the

son and daughter physically examined for signs of sexual abuse. The plaintiffs claimed that the son and daughter were subjected to proctoscopic and culdoscopic examinations in violation of their right to privacy under the Fourteenth Amendment. Under Louisiana law, child care workers who have reason to believe that a child has been sexually abused may obtain a court order for a physical examination of the child. *See* La.Rev.Stat.Ann. § 14:403 Note (West Supp.1993). We conclude that in light of pre-existing law, George and Bennett would not have known that their efforts to fulfill their public responsibility in determining whether sexual abuse occurred violated a constitutional right. *See Darryl H. v. Coler,* 801 F.2d 893, 908 (7th Cir.1986) (state social workers entitled to qualified immunity in action by parents alleging unconstitutionality of visual inspection of unclothed children conducted by social workers in investigation child abuse claim); *see also Landstrom,* 892 F.2d at 676-77 (holding that defendants entitled to qualified immunity because no clearly established constitutional violation where defendants physically examined unclothed child, court found absence of case law establishing a relevant clearly established legal norm against which defendants could have evaluated their own proposed course of conduct.) We find no violation of a clearly established constitutional right.

III

For the foregoing reasons, we hold that George and Bennett are entitled to qualified immunity from liability in this case. The district court's judgment is REVERSED.

KING, Circuit Judge, concurring in the judgment:

I agree with the majority's holding that the caseworkers, Bennett and George, are entitled to qualified immunity as a matter of law. Unlike the majority, however, I do not reach the question whether Doe has alleged the violation of a "clearly established" constitutional right, as required by *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). This is because, in my view, Doe's allegations fail "at an analytically earlier stage of the inquiry into qualified immunity." *Siegert v. Gilley*, ___ U.S. ___, ___, 111 S.Ct. 1789, 1791, 114 L.Ed.2d 277 (1991). Specifically, I would hold that Bennett and George are entitled to qualified immunity because Doe has not asserted the violation of a constitutional right at all. *See id.* at ___, 111 S.Ct. at 1793.

I.

Initially, I note that the allegations in Doe's amended complaint, if true, are "nightmarish." Two child protective services workers, in a rush to prove that Doe sexually abused his young children, launched a four-month investigation which may best be described as a "witch hunt." Among other things, the two workers: suppressed the results of reports indicating that no sexual abuse had occurred; misrepresented to authorities the nature of the findings in those reports; obtained, in secret and through deception, a court order awarding custody of Doe's son to his mother; and gave false information to the District Attorney's office in an effort to have the children removed from the temporary custody of their paternal grandparents. As a result of the deception practiced by

these two workers, Doe was effectively denied all contact with his children for some four months, when he was ultimately exonerated.

That the actions of which Doe complains are egregious, however, does not mean that he has asserted the violation of a federally protected right, as required by 42 U.S.C. § 1983. After all, the gravamen of his complaint is malicious prosecution, a state law tort claim. Thus, as the majority recognizes, "[t]he issue confronting us is whether, and under what circumstances, malicous prosecution might rise to the ievel of a constitutional violation for which § 1983 provides a remedy." Majority Opinion at 14.

II.

The Majority suggests that civil malicious prosecution, such as that alleged in this case, may give rise to a constitutional claim where egregious conduct is present. However, it never actually decides the question. Rather, the majority assumes that an "egregious" civil malicious prosecution could violate the constitution, only to then hold that the right at issue was not clearly established in 1990, when George and Bennett allegedly conducted their bad faith investigation.

I would approach all malicious prosecution claims under § 1983 in a different way. The Fifth Circuit has, admittedly, flip-flopped on the question of whether malicious prosecution is independently cognizable under § 1983. *See Brummett v. Camble*, 946 F.2d 1178, 1180 n. 2 (5th Cir.1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 2323, 119 L.Ed.2d 241 (1992). In my view, the better answer is that

such a claim is not in and of itself cognizable under § 1983. As Judge Posner explained in *Mahoney v. Kesery*, 976 F.2d 1054, 1060 (7th Cir.1992), "[i]f defamation is not actionable [as a constitutional tort, *see Paul v. Davis*, 424 U.S. 693 [96 S.Ct. 1155, 47 L.Ed.2d 405] (1976)], it is difficult to believe that malicious prosecution is." *See also Albright v. Oliver*, 975 F.2d 343, 345-346 (7th Cir.1992), *cert. granted*, ___ U.S. ___, 113 S.Ct. 1382, 122 L.Ed.2d 757 (1993). This does not mean, however, that actions amounting to defamation or malicious prosecution can never form the basis for a § 1983 claim. For example, "either tort can be a link in a chain showing a deprivation of liberty or property without due process of law." *Mahoney*, 976 F.2d at 1060 (citing *Raysor v. Port Authority*, 768 F.2d 34, 39-40 (2d Cir. 1985), *cert. denied*, 475 U.S. 1027, 106 S.Ct. 1227, 89 L.Ed.2d 337 (1986)).[16]

Thus, to the extent that Doe has sought relief solely on the basis of a malicious prosecution, I would hold that the allegations do not, in the words of *Siegert*, assert the violation of a constitutional right at all. To the extent he is asserting a deprivation of liberty or property without due process of law, however, his allegations must be scrutinized more closely.

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[16] Fourth Amendment protections may also be implicated in cases involving malicious prosecution. *See, e.g., Sanders v. English*, 950 F.2d 1152, 1159 (5th Cir.1992).

III.

As I read Doe's amended complaint, he has clearly sought to link George and Bennett's malicious prosecution to a chain showing the deprivation of a liberty interest without due process of law. Doe specifically asserts that the defendants violated his

> fundamental liberty interest in the care, custody, and management of the minor children which is a protected Fourteenth Amendment right pursuant to *Santosky v. Kramer*, [455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599] (1982), because the action of the defendants, as outlined below, sought to destroy the familial bonds *without a fundamentally fair procedure and without sufficient basis in fact.*

(emphasis added). The case on which Doe relies – namely, *Santosky v. Kramer* – is a procedural due process case. There, the Court held that when a state moves to destroy family bonds (i.e., by terminating the parent-child relationship), it must provide the parents with fundamentally fair procedures. Because of Doe's reliance on *Santosky* (and his allegations that he was denied a "fundamentally fair procedure"), I would construe his complaint as attempting to assert a procedural due process claim.[17]

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[17] The majority construes Doe's complaint to raise only a substantive due process claim; yet it relies primarily on *procedural* due process cases in determining that George and Bennett are entitled to qualified immunity. Doe has, admittedly, been less than clear on the question of whether he is asserting a procedural due process claim, a substantive due process claim, or both. My review of his amended complaint, however, convinces me that he has sought to raise a procedural due process

Doe's allegations, if true, clearly satisfy the first two elements of a procedural due process claim. That is, he has sufficiently alleged that he was *deprived* of a *liberty interest*. His amended complaint recounts that, during the four-month investigation, he basically lost custody of his children.[18] And, in *Santosky* the Court made clear that natural parents have a "fundamental liberty interest . . . in the care, custody, and management of their child" – an interest that may be destroyed only with "fundamentally fair procedures." *See* 455 U.S. at 753-54, 102 S.Ct. at 1394-95. Even though Doe was only temporarily deprived of this liberty interest, it seems entirely consistent with *Santosky* to require that this deprivation occur in the context of fundamentally fair procedures. *See Hooks v. Hooks*, 771 F.2d 935, 941 (6th Cir.1985) (reading

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claim. Moreover, because I do not think that there is an independent federal claim for "malicious prosecution," I would necessarily reject any attempt to phrase such a claim as a substantive due process violation. After all, the essence of a malicious prosecution claim is an egregious abuse of the legal process; if such allegations were sufficient to raise a substantive due process claim, then every claim of malicious prosecution would be converted, ipso facto, into a federal claim.

[18] According to his complaint, he initially complied with one of the caseworkers' request that he have no contact with his children. There is some question as to whether this action would constitute a "deprivation" for purposes of due process analysis. *See Weller v. Department of Social Servs. for Baltimore*, 901 F.2d 387, 393 (4th Cir.1990) ("If one voluntarily surrenders a liberty interest to the State, there has been no 'deprivation' of that interest by the State, and no due process violation.") However, there can be no question that when the state district judge placed Doe's children in the temporary custody of their paternal grandparents, he was "deprived" of a liberty interest within the meaning of the Fourteenth Amendment.

Santosky to require that any deprivation of a parent's liberty interest in the custody of his or her children be "accomplished by procedures meeting the requirements of due process").

The problem with Doe's procedural due process claim ultimately lies with his ability to demonstrate – on the facts as alleged – that he was deprived of custody of his children *without due process of law.* Several courts have held that due process does not mandate a *prior hearing* in cases where emergency action may be needed to protect a child. *See, e.g., Weller v. Department of Social Servs. for Baltimore,* 901 F.2d 387, 393 (4th Cir.1990). Of course, when the state temporarily deprives a parent of custody of a child, it must provide a prompt post-deprivation hearing to ratify the emergency action. *See id.* at 396. This is basically what occurred in Doe's case – at least if we accept his allegations as true. Although he temporarily lost custody of his children, the state court procedures ultimately exonerated him and, as a result, his liberty interest was restored.

To the extent that Doe is seeking compensation from George and Bennett for their malicious actions in bringing about this temporary deprivation. I would hold that Louisiana's post-deprivation procedures provide Doe with all the process he is due.[19] *See Mahoney,* 976 F.2d at 1061 (noting possibility that Supreme Court's decision in *Parratt v. Taylor,* 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), has "wiped out" all due process/malicious

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[19] Indeed, it is difficult to see how the state could have intervened to prevent the kind of abuse about which Doe complains.

prosecution claims). Louisiana clearly recognizes an action for civil malicious prosecution. *See Jones v. Soileau*, 448 So.2d 1268, 1271 (La.1984) (the first element of a malicious prosecution claim is "the commencement or continuance of an original criminal *or civil* judicial proceeding") (emphasis added). Moreover, Louisiana law gives caseworkers like George and Bennett only good faith immunity in carrying out their investigative responsibilities.[20] Given that Louisiana's procedures allow tort recovery for the sort of bad faith child abuse investigations at issue here, Doe simply cannot demonstrate that he was deprived of his liberty interest in the custody of his children without fundamentally fair procedures. *Cf. Vinson v. Campbell County Fiscal Court*, 820 F.2d 194, 199 (6th Cir.1987) (concluding that summary judgment on procedural due process/false imprisonment claim was proper when plaintiff alleged "only that she was deprived of a liberty interest because established state procedures were not followed, [and] not that the established state procedure effected a deprivation"); *Fitzgerald v. Williamson*, 787 F.2d 403, 408 (8th Cir.1986) (holding that state law procedures concerning parents' custodial rights were adequate for due process purposes).

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[20] Specifically, at the time of the events in this case, a caseworker could be held civilly or criminally liable if (1) *in bad faith* she "conduct[ed] an investigation, ma[de] an investigative judgment or disposition, or release[d] or use[d] information contained in the central registry," or (2) she "ma[de] a report known to be false or with reckless disregard for the truth of the report." *See* LA.REV.STAT.ANN. § 14:403 (West Supp.1993) (historical notes).

Thus, I would hold that, under *Siegert*, Doe has not asserted a violation of his right to due process of law. George and Bennett are, consequently, entitled to qualified immunity on Doe's procedural due process claim, but only because state procedures provide him with an adequate post-deprivation remedy. This case might be different if Louisiana gave its child protective workers absolute immunity or if, after pursuing his state court remedy, Doe had alleged that the procedures employed by the state were in some way constitutionally defective. But he has not made such allegations. Accordingly, I must conclude that he has not asserted the violation of any federally protected right.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-3144

(USDC #CA 91-1342 II)

JOHN DOE Individually and on behalf of his minor two children,

Plaintiffs-Appellees,

versus

STATE OF LOUISIANA, ET AL.,

Defendants,

PAULA BENNETT and SHERYL GEORGE,

Defendant-Appellants.

Appeal from the United States District Court for the Eastern District of Louisiana

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(Filed NOV 17 1993)

Before KING, EMILIO M. GARZA, Circuit Judges and HALL*, District Judge.

BY THE COURT :

IT IS ORDERED that appellees' motion to remand this cause to the United States District Court, Eastern District of Louisiana, to allow supplementation of the complaint is denied.

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*District Judge of the Eastern District of Texas, sitting by designation.

JOHN DOE Individually and on behalf of his minor two children, Plaintiffs-Appellees,

v.

STATE OF LOUISIANA, et al., Defendants,

PAULA BENNETT AND SHERYL GEORGE, Defendants-Appellants.

No. 92-3144.

Dec. 17, 1992.

Appeal from the United States District Court for the Eastern District of Louisiana.

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion October 5, 5 Cir., 1992, 974 F.2d 36)

Before THORNBERRY, DAVIS and SMITH.

PER CURIAM:

The Court having decided that this case should be heard at Oral Argument, the original opinion is VACATED and the case shall appear on the Oral Argument Calendar.

John DOE, Individually and on behalf of his minor two children, Plaintiffs-Appellees,

v.

STATE OF LOUISIANA, Department of Health & Human Resources, Department of Social Services, Office of Community Services, et al., Defendants.

Paula Bennett and Sheryl George, Defendants-Appellants.

No. 92-3144
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

Oct. 5, 1992.

Appeal from the United States District Court For the Eastern District of Louisiana.

Before THORNBERRY, DAVIS, SMITH, Circuit Judges.

THORNBERRY, Circuit Judge:

Plaintiffs filed a lawsuit pursuant to 42 U.S.C. § 1983 and § 1988 and the Fourteenth Amendment to the United States Constitution. The defendants filed a motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted based on qualified immunity of the individual case-workers, Bennett and George. The district court denied the motion to dismiss, holding that the plaintiffs had overcome the defense of qualified immunity because their complaint's alleged facts indicated that the case-worker's conduct violated clearly established statutory or

constitutional rights of which a reasonable person would have known. On review of a district court's denial of dismissal for failure to state a claim for which relief can be granted, we must accept as true all well-pleaded facts. The complaint is not subject to dismissal "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Chrissy F. By Medley v. Mississippi Department of Public Welfare*, 925 F.2d 844, 846 (5th Cir.1991) (quoting *Conley v. Gibson*, 355 U.S. 41, 45, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957)). The same is true when immunity is urged in a motion to dismiss. *Id.* (quoting *Holloway v. Walker*, 765 F.2d 517, 519 (5th Cir.), cert. denied, 474 U.S. 1037, 106 S.Ct. 605, 88 L.Ed.2d 583 (1985)). After review of the district court's order as well as the plaintiff's original amended complaint, we find that the complaint alleges facts, specifically misrepresentations by the caseworker to both judges and the District Attorney's office, that if proven, would establish that plaintiff's constitutional rights were violated. Taking the allegations of the complaint as true, we affirm the decision of the district court.

Facts and Proceedings Below

Plaintiff Doe and his wife were divorced and both were awarded joint custody of the two minor children, with Doe remaining as custodial parent. During a routine examination for a rash in the vaginal area, the pediatrician inquired as to whether it was possible that the child had been sexually abused. The Mother said that it could at least be possible because the child did not live with her full time. The physician then referred the Daughter to Children's Hospital for a culdoscopic examination to rule

out sexual abuse. Thereafter, the physician filed a report of suspected abuse with the Office of Community Services ("OCS") as required by state law. The OCS commenced an investigation immediately on August 6, 1990. It is the methods used during this investigation, conducted by OCS caseworker George and her supervisor Bennett, which plaintiff alleges violated his constitutional rights.

The adjudication of plaintiff was held approximately four months after the investigation had begun. No physical evidence of abuse was presented and two child psychologists opined that no abuse had ever occurred. Immediately after all testimony, the judge dismissed charges against plaintiff for lack of evidence. Shortly thereafter, this civil action was instituted.

After thorough review of plaintiff's amended complaint, we find that the plaintiff has plead with particularity that the defendants misrepresented facts concerning interviews with plaintiff's children and the existence of crucial evidence. In addition, the complaint clearly alleges that defendants gave false information to the District Attorney's office.

Discussion

John Doe's complaint alleges that defendants George and Bennett violated plaintiff's fundamental liberty interest in the family unit and right of privacy through malicious investigation/prosecution. Defendants George and Bennett plead the defense of qualified immunity, and now argue that plaintiff cannot pass the threshold question of whether the plaintiff has asserted a violation of a

known constitutional right at all. *Siegert v. Gilley*, ___ U.S. ___, ___, 111 S.Ct. 1789, 1798, 114 L.Ed.2d 277 (1991).

In order for Doe to overcome defendant's defense of qualified immunity, Doe must first show that at the time of the alleged conduct there was a clearly established constitutional right that was violated and that a reasonable person would have known that her conduct violated that constitutional right. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982); see also *Anderson v. Creighton*, 483 U.S. 635, 638, 107 S.Ct. 3034, 3038, 97 L.Ed.2d 523 (1987); *Hodorowski v. Ray*, 844 F.2d 1210, 1216 (5th Cir.1988). Further, if the applicable law that binds the conduct of the caseworkers is clearly established at the very moment that the allegedly actionable conduct was taken, the immunity defense should fail. *Harlow*, 457 U.S. at 818, 102 S.Ct. at 2738.

Appellant argues that John Doe has not plead a clearly established constitutional right, and thus has not met the prerequisite to maintaining a Section 1983 claim, and has not overcome the defense of qualified immunity. John Doe's complaint does at least allege the violation of one clearly recognized constitutional right – the right to be free from bad faith and malicious prosecution. This single recognized constitutional right is sufficient to support plaintiff's complaint and allow him to prevail in defendant's motion to dismiss. John Doe's complaint also alleged with particularity a violation of the fundamental liberty interest in the care and management of his minor children. We need not decide whether this alleges a constitutional violation.

In *Sanders v. English*, 950 F.2d 1152, 1163 (5th Cir.1992), this Circuit clearly recognized that there is a constitutional right to be free from bad faith or malicious prosecutions and that these type allegations are sufficient to support a damage claim against state officials under 42 U.S.C. § 1983. In addition, this Circuit affirmed that those acting under color of state authority can be liable for tendering false information to a prosecutor or deliberately concealing or failing to disclose exculpatory evidence which would lead a prosecutor to believe he had probable cause to prosecute when he does not. *Id.* A state actor can be found liable under both § 1983 and the common law for malicious prosecution when a jury could find the defendants concealed and misrepresented facts to a prosecutor, facts which were likely to influence the decision of whether or not to continue prosecuting him up to the day of trial. *See Sanders*, 950 F.2d at 1163 (quoting *Goodwin v. Metts*, 885 F.2d 157, 162-63 (4th Cir.1989) and *Jones v. City of Chicago*, 856 F.2d 985, 993 (7th Cir.1988)). While the Sanders decision clearly defines the perimeters of malicious prosecution claims under a § 1983 claim, the essence of *Sanders* was derived from both *Hand v. Gary*, 838 F.2d 1420, 1427 (5th Cir.1988) and *Wheeler v. Cosden Oil and Chemical Co.*, 734 F.2d 254, 260 (5th Cir.), *modified but reaffirmed in relevant part*, 744 F.2d 1131 (5th Cir.1984). Therefore, these decisions were in effect in Louisiana at the time of the alleged malicious prosecution. But whether or not defendants George and Bennett were aware of these cases is of no moment. Any reasonable state actor employed in a capacity which embraces law enforcement would surely realize that misrepresenting or concealing facts to judges or prosecutors is a

violation of the accuseds' guaranteed rights under the United States Constitution.

Conclusion

Taking the allegations of the plaintiff's complaint as true, as we must do upon a motion to dismiss, and finding that plaintiff has plead a violation of a clearly recognized constitutional right which a reasonable person would have recognized at the time the actionable conduct was taken, we AFFIRM the order of the district court. We do not address the liberty interest arguments of either appellant or appellee as we find it unnecessary to do so at this time.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JOHN DOE, et al	CIVIL ACTION
VERSUS	NO. 91-1342
STATE OF LOUISIANA, et al	SECTION "H"

ORDER & REASONS
(Filed Jan. 31, 1992)

Before the court is defendants' motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. As to plaintiffs' claims against the State of Louisiana, Department of Social Services, Office of Community Services, Maynerva Nelson, and Brenda Kelley, the motion has already been granted.[1] Plaintiffs conceded that the eleventh amendment barred these claims. For the following reasons, the motion is DENIED as to plaintiffs' claims against the remaining defendants, Paula Bennett and Sheryl George, in their individual capacities.

Defendants, George and Bennett, as employees of the Louisiana Department of Social Services Office of Community Services (OCS), conducted an investigation of and judicial proceeding against plaintiff, John Doe, for abuse of his minor children, plaintiffs Daughter and Son.[2] Plaintiffs contend that defendants violated their constitutional rights during the investigation and proceeding, which

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[1] See minute entry dated November 12, 1991.

[2] To shield their identities, the complaint refers to the plaintiff father only as John Doe and to the children as Daughter and Son.

ended when all charges against Doe were dropped after a juvenile court adjudication.

Defendants seek to dismiss plaintiffs' claims against them on the basis of qualified immunity. Qualified immunity is a defense provided to government officials performing discretionary functions. *Anderson v. Creighton*, 483 U.S. 635, 638 (1987). There is no dispute that defendants are entitled to raise this defense. *See Hodorowski v. Ray*, 844 F.2d 1210, 1216 (5th Cir. 1988). The defense shields defendants from liability unless plaintiffs can show that defendants' conduct violated clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 817 (1982). In ruling on this motion to dismiss, I must accept all of the allegations in plaintiffs' complaint[3] as true. *Mireles v. Waco*, 112 S. Ct. 286, 288 (1991). Defendants' motion is denied because "if the allegations of the complaint are proved, [defendants] violated [plaintiffs'] clearly established constitutional rights." *Chrissy F. v. Mississippi Dept. of Public Welfare*, 925 F. 2d 844, 845 (5th Cir. 1991).

Facts As Presented by Plaintiffs

The following is a brief summary of the facts asserted by plaintiffs, taken as true in ruling on the motion to dismiss. At the time the OCS investigation commenced, Doe and his wife (the mother of Daughter and Son) were divorced. The parents had been awarded joint custody of

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[3] Plaintiffs filed an original and one amended complaint. They are referred to collectively as "complaint."

Daughter and Son, with Doe being the custodial parent. The children spent time with both parents. The investigation began following an examination of Daughter by a pediatrician, Dr. Richard Bagnetto, who referred Daughter to Children's Hospital for a culdoscopic examination after he found possible evidence of sexual abuse.[4] OCS was informed. After an interview with Daughter, during which her mother was not allowed to be present, defendant George, the OCS caseworker, concluded that Daughter had been sexually abused. At some point early on in the investigation, George insisted that Doe have absolutely no contact with his children, and he complied.

Daughter was then interviewed by the Jefferson Parish Sheriff's Office, without her mother being present. The interview was videotaped. The mother was informed that the tape provided conclusive evidence that Daughter had been abused by Doe, but that she could not view the tape. Later, she was told that the tape did not exist, and still later that she simply could not see it. On the eve of the juvenile court adjudication, Doe's attorney requested to see the tape and was told that it did not exist; the tape was then produced under threat of a court order. The tape contained no proof that Doe had sexually abused Daughter, and was used as an exhibit for Doe at the adjudication.

On the third day of the investigation, a psychologist, Dr. William Janzen, was chosen by OCS to evaluate Daughter and her mother. After he interviewed them, Dr.

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[4] According to plaintiffs, Daughter had a recurring yeast infection previously diagnosed by another pediatrician.

Janzen concluded that there was no abuse. George told the mother that Dr. Janzen did not make a report of his conclusions. On the eve of trial, however, George disclosed Dr. Janzen's report.

Early on in the investigation, defendant George requested that Son be interviewed, although he was vacationing in North Carolina with his paternal grandparents and other relatives. George, along with Jefferson Parish Detective John Pinero, agreed to wait to interview Son until he returned to New Orleans a few weeks later. After agreeing to this arrangement, George and defendant Bennett, George's OCS supervisor, secretly wrote to the Twenty-Fourth Judicial District Court and described Son as a victim of sexual abuse by Doe; they also described Son as being in urgent danger. The result was that court orders were issued and the mother was dispatched to North Carolina, where, in the company of a local sheriff, she took Son back to New Orleans.

An informal expedited hearing was then conducted by the Twenty-Fourth Judicial District Court judge who had presided over Doe's divorce and custody proceedings. At that hearing, the judge concluded that the OCS case file contained at least one material factual misrepresentation, in that it misrepresented Dr. Bagnetto's physical findings. The judge placed the children in the custody of the paternal grandparents.

In the following days, defendant George and Detective Pinero interviewed Son, but refused to videotape the interview or to allow an independent child psychologist to be present during the interview. George declared that

the interview was inconclusive. However, at the adjudication, she was forced to admit that neither child had ever made any statement to her to establish that either of them had been abused.

George also claimed during the investigation that the culdoscopic examination of Daughter was inconclusive. At the adjudication, the judge found that the results were negative, not inconclusive, and George was forced to admit that the results were negative. Although there was no evidence that Son was a victim of sexual abuse, as part of the investigation George insisted that Son undergo a proctoscopic examination, despite the protests of the his mother and Doe. The test was negative for evidence of abuse.

Defendant George, through manipulation and false statements, undertook to change the custody of the children from the grandparents to the mother, and OCS made threats to the mother that her children would be placed in a foster home if she did not give evidence that the children had been molested by Doe. George gave false information to the District Attorney's office in an effort to have the children removed from the custody of the grandparents. Defendants then attempted to proceed with an unjustified investigation of abuse of Daughter and Son by the grandparents, which was thwarted once counsel intervened.

The adjudication was held approximately four months after the investigation had begun. No physical evidence of abuse was presented; two child psychologists opined that no abuse had ever occurred. The treating pediatrician concluded that there had been no abuse, and

Dr. Bagnetto testified that, had he had a more complete medical picture of Daughter's past treatment, a call to OCS would never have been made. Immediately after all testimony, the judge dismissed the charges.

Discussion

When government officials abuse their offices, "action[s] for damages may offer the only realistic avenue for vindication of constitutional guarantees." *Harlow*, 457 U.S. at 814, *quoted in*, *Anderson*, 483 U.S. at 638. On the other hand, damage suits against officials could unduly inhibit them from properly discharging their duties. *Id.* These conflicting concerns are accommodated by providing governmental officials with qualified immunity, shielding them from liability if their actions were legally reasonable from an objective standpoint, "assessed in light of the legal rules that were 'clearly established' at the time [the actions were] taken." *Anderson*, 483 U.S. at 639 (quoting *Harlow*, 457 U.S. at 818).

In *Santosky v. Kramer*, 455 U.S. 745 (1982), the Supreme Court clearly established that the interest of natural parents in the care, custody, and management of their children is a fundamental liberty interest protected by the due process clause of the fourteenth amendment. *See also Lassiter v. Department of Social Serv.*, 452 U.S. 18 (1981); *Stanley v. Illinois*, 405 U.S. 645 (1972). I recognize that the right to "due process" is broad, and that the right that defendants are said to have violated "must be 'clearly established' in a more particularized . . . sense." *Anderson*, 483 U.S. at 639. On the other hand, plaintiffs

need not show that defendants' very actions have previously been held to be unlawful. *Id.* at 640. Defendants' liability turns on the "objective legal reasonableness" of their actions: The contours of defendants' rights must have been sufficiently clear that a reasonable official would have understood that what she was doing violated those rights. *Id.* Reasonable officials conducting themselves in the manner that plaintiffs allege defendants did would have understood that they were violating plaintiffs' rights.

The activities described by plaintiffs afforded them anything but due process. Defendants misrepresented the contents of the tape recorded interview with Daughter and made misrepresentations about the existence of the tape itself. Defendant George denied that Dr. Janzen had rendered a report. In actuality, Dr. Janzen had concluded in a written report that Daughter had not been abused. George also misrepresented the results of Daughter's culdoscopic examination. Defendants misrepresented facts concerning abuse of Son to a judge and in so doing caused the judge to issue orders to have Son retrieved from North Carolina. At the informal hearing, the judge concluded that defendants' case file contained a material misrepresentation about Dr. Bagnetto's physical findings. George gave false information to the District Attorney's office in an effort to remove the children from the custody of the grandparents. At the adjudication, defendant George revealed that neither child had ever made any statement to her to establish that they had been abused, despite her prior assertions to the contrary. As a result of defendants' activities, plaintiffs were all subjected to unnecessary psychological and emotional damage, and

the children were subjected to unnecessary physical examinations.

Defendants' actions are analogous to those recognized by the Fifth Circuit, as well as other circuits, as being the basis for a claim for bad faith prosecution. There is a constitutional right to be free from bad faith prosecution, and such prosecution can be sufficient to support a damage judgment against state law enforcement officials under section 1983. *Hand v. Gary*, 838 F.2d 1420, 1424 (5th Cir. 1988) (citing *Wheeler v. Cosden Oil and Chemical Co.*, 734 F.2d 254 (5th Cir.), *modified on reh'g on other grounds*, 744 F.2d 1131 (5th Cir. 1981)). Moreover, "state actors other than prosecutors may be liable for damages for bad faith prosecution, if they join in malicious prosecution by prosecutors, or if their malice results in an improperly motivated prosecution without probable cause." *Id.* at 1426. *See also Goodwin v. Metts*, 885 F.2d 157 (4th Cir. 1989), *cert. denied*, 494 U.S. 1081 (1990) (continuation of criminal proceedings after evidence developed to show plaintiff innocent of crime established constitutional malicious prosecution case; policeman who supplied false information liable).[5]

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[5] The Fifth Circuit recently reaffirmed that claims for bad faith prosecution are compensable under section 1983. *Sanders v. English*, 1991 U.S. App. Lexis 573 (5th Cir. 1992). In *Sanders*, the court cited *Hand*, *Wheeler*, and *Goodwin* with approval, and noted that "[d]eliberately concealing or deliberately failing to disclose exculpatory evidence, like 'maliciously tendering false information,' can . . . form the basis for an inference that a [state official] acted with malice in initiating and maintaining a prosecution." *Id.* at 32.

These cases establish that malicious prosecution is actionable under section 1983 only when federally guaranteed rights are violated. *Hand*, 838 F.2d at 1424; *Wheeler*, 734 F.2d at 260; *Goodwin*, 885 F.2d at 160 n.1. Unlike the instant case, those cases involved violations of constitutional rights in the context of criminal proceedings. Defendants' bad faith maintenance of proceedings against Doe rises to the level of a constitutional tort as well, because under the facts alleged by plaintiffs, defendants violated their fundamental liberty interest in Doe's care, custody, and management of Daughter and Son, as that liberty interest is protected by the fourteenth amendment. Moreover, all plaintiffs sustained significant personal injury as a result of defendants' actions. All three sustained serious mental anguish, and the two children, serious physical invasions of their bodies as well.

Plaintiffs' claims give rise to concerns that are similar to those expressed by the Supreme Court in *Brady v. Maryland*, 373 U.S. 83 (1963), in its discussion of what violates the due process clause of the fourteenth amendment:

> [due process] cannot be deemed to be satisfied by mere notice and hearing if a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of the court. . . . Such a contrivance by a state to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demand of justice as is the obtaining of a like result by intimidation.

Id. at 86 (quoting *Mooney v. Holohan*, 294 U.S. 103, 112 (1935)). Plaintiffs have not alleged that defendants presented false testimony at the adjudication, and the adjudication would not have resulted in Doe's imprisonment. But defendants did abuse the processes available to them and shielded the truth from plaintiffs and the court throughout the investigative process, until the time of the adjudication, thus depriving plaintiffs of liberty interests protected by the fourteenth amendment. If plaintiffs' allegations prove to be true, defendants' actions were not "objectively legally reasonable;" their actions violated plaintiffs' clearly established constitutional rights.

I am aware of the policy considerations involved in allowing plaintiffs to proceed with their claims against defendants; the Fifth Circuit discussed these considerations in determining that state child protective service workers are entitled to qualified immunity, but not to absolute immunity.

> Though we do not wish to restrict unduly the scope of child abuse investigations, we also do not wish to impinge on the "most essential and basic aspect of familial privacy – the right of the family to remain together without the coercive interference of the awesome power of the state." *Duchesne v. Sugarman*, 566 F.2d 817, 825 (2d Cir. 1977). We think that qualified immunity, not absolute immunity, strikes the better balance between these concerns. As the Second Circuit has observed in reaching the same results in these circumstances, "[W]e think the strong emotional response provoked in anyone hearing an allegation of child abuse counsels against according an official absolute immunity for a

> taking in the wake of any and every such allegation, lest the official power itself become more likely to be abused. . . . " *Robison v. Via*, 821 F.2d 913, 920 (2d Cir. 1987).

Hodorowski, 844 F.2d at 1216.[6] I am aware of the danger that litigation such as this can cause child protective service workers to shift their attention from protecting abused children to avoiding vexatious litigation, thus threatening the health and safety of abused children. *See id.* at 1215 (quoting *Mazor*, 637 F. Supp. at 334-35). As the Fifth Circuit explained in rejecting a claim of absolute immunity for child protective service workers, that danger should not deter a court from protecting parents from abuse of official power in an appropriate case. *Id.* at 1216. Plaintiffs' claims must proceed, because if their allegations prove to be true, defendants have abused their powers.

Defendants argue in the alternative that if plaintiffs' complaint is not dismissed, I should strictly tailor and limit discovery "to those facts which the Court believes are in dispute and necessary to resolve the issue of qualified immunity. . . . " I question what practical result such an order would have on discovery, other than to exclude

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[6] In *Hodorowski*, the Fifth Circuit noted that some district courts have granted absolute immunity to child protective service workers for policy reasons. *Id.* at 1215 (citing *Mazor v. Shelton*, 637 F. Supp. 330 (N.D. Cal. 1986); *Hennessey v. Washington, Dept. of Social and Health Serv.*, 627 F. Supp. 137 (E.D. Wash. 1985); *Whelehan v. County of Monroe*, 558 F. Supp. 1093 (W.D.N.Y. 1983)). The Fifth Circuit declined to follow the reasoning of those cases. *Id.* at 1216.

discovery on the issue of damages, but I invite the parties to submit such an order for my consideration.

New Orleans, Louisiana, this 31st day of January, 1992.

/s/ Adrian G. Duplantier
UNITED STATES DISTRICT COURT

MINUTE ENTRY
DUPLANTIER, J.
November 12, 1991

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JOHN DOE, individually and on behalf of his two minor children

VERSUS

STATE OF LOUISIANA, DEPARTMENT OF SOCIAL SERVICES, OFFICE OF COMMUNITY SERVICES, MS. MAYNERVA NELSON, in her capacity as Secretary, MS. BRENDA KELLEY, in her capacity as Assistant Secretary, MS. PAULA BENNETT and MS. SHERYL GEORGE

CIVIL ACTION
NO. 91-1342
SECTION "H"

In response to the "Motion by Defendants to Quash Depositions Scheduled by Plaintiff for October 24, 1991, and to Stay all Further Discovery In This Case Until Further Order Of This Court", the magistrate ruled that the depositions of John B. Pinero and Sheryl George could proceed, and to that extent defendants' motion was denied. Defendants appealed that ruling.

On October 29, 1991, a telephone conference attended by Michael Christovich, Miles Clements, and Thomas Balhoff was conducted to consider the "Motion for Appeal Filed by Defendants From Magistrate's Order Denying Defendants' Motion to Quash Depositions Scheduled By Plaintiff for October 24, 1991 And To Stay All Further Discovery And Seeking Reversal Of Said

Magistrate's Order." The motion to dismiss which had previously been filed on behalf of all defendants was also discussed.

During the conference, counsel for plaintiff conceded that the original complaint did not contain the specific facts necessary to overcome the defense of qualified immunity and stated that plaintiff intended to filed an amended complaint specifying those allegations promptly after discovery relating to the allegations of qualified immunity was conducted.

I affirmed the magistrate's ruling insofar as it permitted discovery regarding the issue of qualified immunity. I now set the following deadlines:

1. Not later than November 25, 1991, plaintiff is to complete discovery related to qualified immunity;

2. Not later than December 3 plaintiff is to file an amended complaint if plaintiff contends that he can by amendment defeat the motion to dismiss;

3. Not later than December 9 defendants Paula Bennett and Sheryl George[1] are to file a supplemental memorandum in support of the defense of qualified immunity if they wish to persist with said motion notwithstanding the allegations of the amended complaint. Id

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[1] Plaintiff's memorandum in opposition to defendants' motion to dismiss concedes Eleventh Amendment immunity as to all other defendants. Hence the motion to dismiss is GRANTED as to all other defendants. I will entertain a motion on behalf of those defendants to enter judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

defendants so persist, a hearing on the motion to dismiss will be held December 18 at 9:00 a.m. Plaintiff's response to defendants' supplemental memorandum is due not later than December 16.

/s/ Adrian G. Duplantier

MINUTE ENTRY
DUPLANTIER, J.
November 15, 1991

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JOHN DOE, individually and on behalf of his two minor children

VS.

STATE OF LOUISIANA, DEPT. OF SOCIAL SERVICES, OFFICE OF COMMUNITY SERVICES, MS. MAYNERVA NELSON, in her capacity as Assistant Secretary, MS. PAULA BENNETT and MS. SHERYL GEORGE

CIVIL ACTION
NO. 91-1342
SECTION "H"

In view of the correspondence to me from counsel after my minute entry of November 12, I amend that minute entry. I delete the final paragraph setting deadlines.

I will rule on the motion to dismiss. Thereafter, if necessary, deadlines with respect to qualified immunity issues may be re-set.

/s/ Adrian G. Duplantier

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

JOHN DOE, individually and on behalf of his two minor children	*	CIVIL ACTION
	*	NUMBER 91-1342
VERSUS	*	SECTION "H"
	*	MAGISTRATE NO.
STATE OF LOUISIANA, DEPARTMENT OF SOCIAL SERVICES, OFFICE OF COMMUNITY SERVICES, MS. MAYNERVA NELSON, in her capacity as Secretary, MS. BRENDA KELLEY, in her capacity as Assistant Secretary, MS. PAULA BENNETT and MS. SHERYL GEORGE	*	1
	*	(Filed Jan. 31, 1992)

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RULE 54(b) JUDGMENT DISMISSING PLAINTIFF'S COMPLAINT AS TO DEFENDANTS, STATE OF LOUISIANA, DEPARTMENT OF SOCIAL SERVICES, OFFICE OF COMMUNITY SERVICES, MAYNERVA NELSON, AND BRENDA KELLEY

After considering the entire record of this matter, defendants having moved for an order pursuant to Rule 12 of the Federal Rules of Civil Procedure seeking dismissal of plaintiff's complaint as to all the defendants, and the Court having considered the memorandums filed in support of that motion and in opposition to that motion and submitted by the respective parties, the Court

having expressly directed by minute entry this date that judgment be entered;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the motion for dismissal pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, and filed on behalf of defendants, State of Louisiana, Department of Social Services, Office of Community Services, Maynerva Nelson and Brenda Kelley, be and the same is hereby granted, and it is hereby ordered that plaintiff's claims and/or complaint as against those defendants be and the same are hereby dismissed, with prejudice, at plaintiff's costs.

New Orleans, Louisiana, this 31st day of January, 1992.

/s/ Adrian G. Duplantier
JUDGE, UNITED STATES
DISTRICT COURT
EASTERN DISTRICT OF
LOUISIANA

Respectfully submitted,

WILLIAM J. GUSTE, JR.
Attorney General

BY: /s/ Thomas E. Balhoff
Thomas E. Balhoff, #2716
Judith R. Atkinson, #17240
Special Assistant Attorney Gen.
Mathews, Atkinson, Guglielmo,
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Baton Rouge, Louisiana 70821
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CERTIFICATE

I hereby certify that a copy of the foregoing has this day been mailed, postage prepaid, to all counsel of record.

Baton Rouge, Louisiana, this 14th day of November, 1991.

/s/ Thomas E. Balhoff
Thomas E. Balhoff

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-3144

JOHN DOE, Individually and on behalf
of his minor two children,

Plaintiffs-Appellees,

versus

STATE OF LOUISIANA, ET AL.,
Defendants,

PAULA BENNETT and SHERYL GEORGE,
Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of Louisiana

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 10/04/93, 5 Cir., ___, ___ F.2d ___)

(November 12, 1993)

Before KING, and EMILIO M. GARZA, Circuit Judges, and HALL,* District Judge.

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* District Judge of the Eastern District of Texas, sitting by designation.

PER CURIAM:

(✓) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Emilio M. Garza
United States Circuit Judge

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

JOHN DOE, individually and on behalf of his two minor children	*	CIVIL ACTION
	*	NO. 91-1342
VERSUS	*	SECT. H
	*	MAG. 1
STATE OF LOUISIANA, DEPARTMENT OF SOCIAL SERVICES, OFFICE OF COMMUNITY SERVICES, MS. MAYNERVA NELSON, in her capacity as Secretary, MS. BRENDA KELLEY, in her capacity as Assistant Secretary, MS. PAULA BENNETT and MS. SHERYL GEORGE	*	

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COMPLAINT

(Filed April 5, 1991)

COMES NOW, John Doe, a person of the full age of majority, individually and on behalf of his two minor children, of whom he is the natural parent and tutor, and for complaint against the State of Louisiana, Department of Social Services, Office of Community Services, Ms. Maynerva Nelson, in her capacity as Secretary, Ms. Brenda Kelley, in her capacity as Assistant Secretary, Ms. Sheryl George and Ms. Paula Bennett, respectfully avers:

I.

John Doe (hereinafter "plaintiff") is a resident of the Parish of Jefferson, State of Louisiana and is the natural

parent of a son, age nine, and daughter, age five (hereinafter "the children"). Plaintiff brings this Complaint under a fictitious name in order to protect his minor children from public exposure of the sensitive matters which form the basis of the Complaint. Plaintiff petitions the Court to order that this litigation proceed on a confidential basis, with the record sealed from public access.

II.

The aforesaid minor children reside with their father and have visitation with their natural mother. Plaintiff and his former wife, the natural parents of the children, obtained a lawful divorce in the Twenty-Fourth Judicial District Court, Parish of Jefferson, during 1989. By order entered in January, 1991, plaintiff was made custodial parent by the Court and, accordingly, is the proper person to bring those claims on behalf of the children.

III.

This action is brought pursuant to 42 U.S.C. § 1983 and § 1988 and the Fourteenth Amendment to the United States Constitution. Jurisdiction is founded upon 28 U.S.C. § 1331 and § 1343 (3) and (4) and the aforementioned statutory and constitutional provisions. Plaintiff further invokes the pendant jurisdiction of this Honorable Court to hear and decide claims arising under State law. The amount in controversy exceeds Fifty Thousand and 00/100 ($50,000.00) Dollars, excluding interest, costs and attorneys fees.

IV.

The defendants are the Office of Community Services (hereinafter "OCS"), which is an agency of the Department of Social Services, State of Louisiana, such that this Complaint is brought against both the agency and the State of Louisiana. Ms. Maynerva Nelson (hereinafter "Nelson") is named as a defendant in her capacity as the Secretary of the Department of Social Services and Ms. Brenda Kelley (hereinafter "Kelley") is named in her capacity as Assistant Secretary of the Department of Social Services in charge of OCS. The remaining individual defendants are Ms. Paula Bennett (hereinafter "Bennett") and Ms. Sheryl George (hereinafter "George"), individual employees of the State of Louisiana and OCS who are named individually and in their professional capacities as representatives of OCS.

V.

At all times hereinafter mentioned, defendants were acting under color of law, to wit, under color of the statutes, ordinances, regulations, policies, customs and usages of the State of Louisiana and its OCS agency, including but without limitation LSA-R.S. 14:403, *et seq.*

VI.

On Monday, August 6, 1990, OCS commenced an investigation in connection with allegations of abuse against plaintiff pursuant to LRS 14:403, *et seq.* (OCS Case No. 1990-CC-116B). However, OCS and its individual representatives failed to conduct an investigation in good faith and instead undertook to falsely, maliciously and

recklessly pursue and prosecute plaintiff. Plaintiff was ultimately acquitted of all charges and it was judicially determined that his children had never been subjected to the abuse which defendants wrongfully attempted to establish.

VII.

The conduct of the defendants exhibited malicious, reckless and callous indifference to the federally protected rights of plaintiff and his children and was motivated by evil intent. Accordingly, defendants are liable to plaintiff and the children for punitive damages.

VIII.

The malicious actions of the defendants, including the commencement and continuance of the proceeding against plaintiff in the absence of probable cause render them liable to plaintiff on the grounds of malicious prosecution.

IX.

The actions of defendants violated the fundamental liberty interests of plaintiff and his children in the care, custody and management of the family relationship, and was detrimental to their vital interest in maintaining their family life. Moreover, the extraordinary accusations which were made and the procedures which defendants imposed upon both plaintiff and his children resulted in humiliation and emotional devastation which will continue into the future.

X.

OCS has maintained and implemented a policy, or policies, which not only permit, but encourage the unlawful and malicious abuses by its representatives and employees. Additionally, the individuals employed by OCS have knowingly acted in bad faith in the conduct of their office and in the discharge of their official duties. Accordingly, all of the defendants are liable to plaintiff and his children for these abuses to which they have been subjected.

XI.

As the result of the wrongful acts of defendants, plaintiff and his children have been damaged and deprived of their constitutional rights and are entitled to both compensatory and punitive damages, together with the costs of this action, interest and all attorneys fees. The damages demanded are in an amount sufficient both to compensate plaintiff and his children fairly, and to punish defendants and deter them from further improvident actions.

WHEREFORE, plaintiff, John Doe, individually and on behalf of his two minor children, prays that the defendants be duly cited to appear and answer the matters aforesaid, and that after due proceedings had, judgment in favor of plaintiff and against defendants be entered in an amount which will fairly compensate plaintiff and his children, as well as punish and deter defendants from further wrongful activity, together with interest, costs and all attorneys fees, and for all other relief which justice demands. Plaintiff further prays that the Court

order this litigation to proceed in the fictitious name of John Doe, on a confidential basis and with the record sealed from public access.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JOHN DOE, individually and on behalf of his two minor children	*	CIVIL ACTION
VERSUS	*	NO. 91-1342 SECTION "H"
STATE OF LOUISIANA, DEPARTMENT OF SOCIAL SERVICES, OFFICE OF COMMUNITY SERVICES, MS. MAYNERVA NELSON, in her capacity as Secretary, MS. BRENDA KELLEY, in her capacity as Assistant Secretary, MS. PAULA BENNETT and MS. SHERYL GEORGE	*	MAG. NO. 1

****

AMENDED COMPLAINT

(Filed Nov. 19, 1991)

NOW INTO COURT, through undersigned counsel, come John Doe, a person of the full age of majority, individually and on behalf of his two minor children, pursuant to F.R.Civ.P. 15 and amend their previously filed complaint by adding the following paragraphs as follows:

XII.

Based on the facts previously-set forth in their original Complaint and the facts averred below, the defendant government officials, including Ms. Bennett and Ms. George in their individual capacities, are not shielded from liability for civil damages, because their conduct

violated clearly established constitutional rights of which a reasonable person would have known.

XIII.

The defendants violated the plaintiffs' fundamental liberty interest in the care, custody, and management of the minor children which is a protected Fourteenth Amendment right pursuant to *Santosky v. Kramer*, ___ U.S. ___ 102 S.Ct. 1388 (1982), because the action of the defendants, as outlined below, sought to destroy the familial bonds without a fundamentally fair procedure and without sufficient basis in fact.

XIV.

The plaintiffs show that the defendants' conduct violated their Fourteenth Amendment rights because the defendants continued their unwarranted intrusion in the fundamental liberty interest of the plaintiffs by continuing the investigation and prosecution of the first-named plaintiff despite the lack of evidence to support the defendants actions. In light of the complete lack of evidence the defendants did not have reasonable grounds to continue their investigation.

XV.

Further, the defendants violated the minor children's right to privacy by unreasonably subjecting them to invasive culposcopic and proctroscopic examinations in violation of their Fourteenth Amendment privacy rights.

XVI.

The following facts, based on reasonable inquiry, show that the defendants were not objectively reasonable in constantly subjecting the Doe family to harassment, coercion and threats of permanent loss of custody, all in violation of the plaintiffs' Fourteenth Amendment Privacy Rights.

XVII.

In November, 1989, John Doe ("Doe") and his spouse ("the Mother") divorced. Joint custody of their two children was awarded with Doe being the custodial parent. Thereafter, the children spent time with both of the parents who maintained separate residences.

XVIII.

The Office of Child Protection ("OCS"), a division of the Department of Social Services, initiated an investigation on August 6, 1990, following an examination by a pediatrician, Dr. Richard Bagnetto. On the morning of August 6th, the natural mother (the Mother) of the four-year old female ("the Daughter"), had taken her child to see Dr. Bagnetto for a routine examination. Dr. Bagnetto observed the Daughter to have vaginal irritation which, unbeknownst to Dr. Bagnetto, was a yeast infection which had been a recurring problem for many months. Dr. Bagnetto had not seen the child in two years and was unaware that treatment in preceding months had been by another pediatrician, Dr. Keith Perrin. Dr. Bagnetto was

completely unaware that Dr. Perrin had previously diagnosed vaginitis directly resulting from improper bathroom hygiene complicated by the child's obesity, nor was Dr. Bagnetto aware that Dr. Perrin had diagnosed a condition observed everyday in the course of treating children. Lastly, Dr. Bagnetto did not know that Dr. Perrin had prescribed baking soda baths and the application of an ointment (Keflex) to the child's vagina. In an abundance of caution, if not over reaction, Dr. Bagnetto referred the child to Children's Hospital, for a culposcopic examination to rule out abuse. A telephone call was then made to OCS.

XIX.

Thereafter, as the evidence will show, the OCS conducted a nightmarish witch hunt designed solely to secure a conviction of child abuse against Doe. In so doing, the OCS counselors, acting under color of law, harassed the Daughter and her eight-year old brother ("the Son"), and by their tactics caused them to suffer significant emotional damage. In their reckless pursuit of Doe on what is undoubtedly the most serious accusations which can be made against any man-that he sexually molested his children-the OCS maliciously subjected him to humiliation and emotional turmoil and trampled the constitutional rights of the family, all in violation of the plaintiffs' Fourteenth Amendment rights to privacy.

XX.

The defendants' pattern of behavior over a five-month period in which they attempted to manipulate the

children to give false evidence against their father, coerced the Mother, created false allegations and evidence, misused the Office of the District Attorney for the Parish of Jefferson, and practiced deception on all concerned, violated the plaintiff's constitutional right to privacy.

XXI.

Upon commencing the investigation, the OCS case worker, Ms. Sheryl George ("George"), separately interviewed the Daughter and her mother. George refused to permit the Mother to be present during the interview. It is believed that George subjected the child to repeated questions concerning her genitalia and related matters, following which she forced the child to play with anatomically correct dolls. George then emerged from this prolonged session and informed the Mother that her daughter had been sexually abused. George then arranged another prolonged interview of the Daughter by the Jefferson Parish Sheriff's Office. Again, the Mother was not allowed to be present during the interview, but this time the interview was videotaped. For approximately thirty-five minutes, the interviewer repeatedly pressured the child in an effort to have her make false statements against her father and to put words in her mouth. Remarkably, the child did not succumb to the pressures and could not be made to lie. Despite this, at the conclusion of the interview, the Mother was again told that there was conclusive evidence of molestation by the father and that it was all on tape. Subsequently, after the Mother's initial shock wore off and she grew suspicious of the actions and motives of OCS, she asked to

see the tape. However, she was then told that no tape existed. When she pleaded further, explaining that she knew a tape existed, she was told that she could not see it and she was ordered to say nothing about it. When Doe's attorney requested the tape in the course of authorized discovery on the eve of the Juvenile Court adjudication in December, he was told that the tape did not exist. Only under the threat of a court order was the tape miraculously produced, viewed and made *defense* exhibit no. 1 at the adjudication.

XXII.

On Wednesday, August 8, 1990, the third day of the "investigation", Dr. William Janzen, the OCS hand-picked psychologist, interviewed and evaluated both the Daughter and the Mother. He concluded that there was no abuse. Not only did George fail to disclose the results of this evaluation until the eve of the adjudication, when she was forced to produce the information in pre-adjudication discovery, but she repeatedly told the Mother that Dr. Janzen had not issued a report. Obviously, George feared that the disclosure would undermine her efforts to continue the witch hunt and manipulate the Mother. George's motives are further illustrated by her efforts to mislead Dr. Janzen with factually inaccurate statements designed to convince him that the Daughter had "recanted".

XXIII.

The children's uncle ("the Uncle"), who ultimately became the Father's counsel at the adjudication, made

repeated efforts at the outset of the investigation to make all relevant information known to OCS. The Uncle obtained the medical records of both Dr. Bagnetto and Dr. Perrin and furnished them to George. The Uncle undertook the logistics of making his nephew (Doe's son) available to OCS and to the Jefferson Parish Sheriff's Office for an interview concerning the investigation as to Doe's daughter. The actions of OCS with respect to the Son, who was not the subject of any charges, are among the most malicious and clearly violate the Son's constitutionally-protected privacy rights.

XXIV.

In August when the investigation concerning the Daughter began, the Son was in North Carolina with his grandparents, cousins, and other family members. At the outset of the investigation, George insisted that Doe have no contact by telephone or otherwise with either of his children. Doe complied. It thus became logistically difficult to transport the Son back to New Orleans from North Carolina since it was previously planned that Doe would join him on the vacation and drive him back home. The Uncle made known this logistical problem to George, as well as to Detective John Pinero and of the Sheriff's Office, and *both* agreed to wait until August 27 to interview the Son in New Orleans. Immediately after making this agreement, George and her supervisor, defendant Paula Bennett, secretly wrote a letter to the 24th Judicial District Court in which they described the Son as a *victim* and identified their father as the alleged perpetrator. They misled the 24th Judicial District Court with representations that the Son was in urgent danger, with the

result that orders were issued; the Mother was dispatched to North Carolina where in the company of a local sheriff, the Son was suddenly and without warning snatched away from his family. This action violates the plaintiff's privacy rights under the Fourteenth Amendment. *See Santosky v. Kramer,* 102 S.Ct. 1388.

XXV.

An expedited hearing was set before the Honorable Charles Cusimano of the 24th Judicial District Court, who had entered the orders regarding divorce and child custody the previous year. Judge Cusimano conducted an informal hearing, in which it became known, among other things, that the OCS case file contained at least one material factual misrepresentation. Although the OCS refused to release its file to anyone but Judge Cusimano, his questioning of Dr. Bagnetto, who was present at the hearing, enabled the Judge to conclude that the OCS file misrepresented Dr. Bagnetto's physical findings. Judge Cusimano entered new orders placing the custody of both children with the paternal grandparents.

XXVI.

In the following days, George and Detective Pinero interviewed the Son. The Son's Uncle requested that an independent child psychologist be allowed to be present during the interview, but defendant, George refused. The Uncle then requested that the interview be videotaped to protect the integrity of the process, but again George refused. The interview by George thereafter proceeded secretly following which George declared that it was

inconclusive. However, at the eventual adjudication, she was forced to admit that neither child *ever* made any statement to her to establish that either had been abused. However, she explained that she did not believe either child since they did not implicate their father.

XXVII.

The culposcopic examination of the Daughter was thereafter conducted. Although it was negative, George rejected the findings, describing them as "inconclusive". At the adjudication, the presiding judge held on the record that the results were not inconclusive; they were *negative*. Reluctantly, on the stand defendant George admitted to the Court that the culposcopic examination was negative.

XXVIII.

In clear violation of the Son's right to privacy in his own person, George insisted that the Son undergo an invasive proctoscopic examination, even though there was no indication whatsoever that the Son was a "victim,". His mother, Doe, the Uncle and custodial grandparents all pleaded that this sensitive eight-year old child not be subjected the trauma of this procedure. However, George was insistent and the child was put through the ordeal of an examination by a physician who was openly hostile and abusive. Notwithstanding the shocking behavior of the OCS' physician, the test was negative for evidence of abuse.

XXIX.

Thereafter, George continued her invasion of the family unit and through manipulation and false statements, undertook to change the custody of the children from the Grandparents to the Mother. At the same time, OCS made threats to the Mother that her children would be placed in a foster home in another city if the Mother would not give evidence that the children had been molested by their father. It was apparently George's hope that she could more effectively manipulate the children directly (she hoped with the assistance of their Mother), to make false statements against their Father, if the Mother was given sole custody.

XXX.

It is believed that George gave false information to the Office of the District Attorney that the court-appointed custodians, the Grandparents, had willfully refused to permit the daughter to attend group crisis sessions at the OCS office. On the basis of a false report given by George to the District Attorney, a motion was brought in Juvenile Court seeking the change of custody from the Grandparents. However, in previous weeks George had informed family members, in response to specific inquiries concerning the group crisis program, that the Daughter should *not* be attending the sessions. Accordingly, George's report to the District Attorney was false.

XXXI.

Because George's effort to change custody in Juvenile Court was unsuccessful, it is believed that defendants

then used a new and separate investigation against the Grandparents, as a means of changing custody of the children. Incredibly, the OCS called the Grandparents and instructed them immediately to bring the children to the OCS office because the grandparents were under investigation for physical abuse of the children. Only after the intervention of counsel and an examination by OCS of the children, was it determined that there was no justification to pursue an investigation against the Grandparents.

XXXII.

The OCS was finally required to proceed to an adjudication of Doe on December 11, 1990. No physical evidence of abuse was presented, because none existed. Two child psychologists, including Dr. Janzen, who by that time had completed multiple sessions with the mother, Doe and children, opined that no abuse had ever occurred. The treating pediatrician testified that there had been no abuse and Dr. Bagnetto testified that, had he had a more complete medical picture of the Daughter's past treatment, a call to OCS would never have been made. George indicated under cross-examination that throughout the course of her "investigation", she essentially chose to disregard facts which absolved Doe and instead pursued facts which might tend to incriminate him. She was also forced to concede that she was able to establish in her interviews with both children that neither had been subjected to "bad touching". Immediately after all testimony, the Judge dismissed the charges.

XXXIII.

George and her supervisor Bennett maliciously pursued an investigation and caused a prosecution to be made under circumstances where there was no justification to do so. In so doing, they intruded upon and violated the family unit and integrity, and caused injury to the father and his children, in violation of the plaintiffs rights to privacy and their fundamental liberty interests in their family unit. The tactics undertaken by the defendants failed to provide a fundamentally fair procedure, failed to protect the plaintiffs' interest in the accuracy of and justice in the proceeding, and was not objectively reasonable. The defendants' conduct clearly violated the plaintiffs privacy rights and liberty rights, recognized in the United States Constitution, including their rights under the Fourteenth Amendment to the Constitution.

WHEREFORE, the plaintiffs reaver and reallege each of their original allegations set forth in their original Complaint and pray that leave to file this Amended Complaint be granted and that after service on the defendants, that the defendants be required to answer the same and that after due proceedings are held, there be judgment rendered in favor of the plaintiffs and against

defendants all as originally prayed for in the original Complaint.

Respectfully submitted,

/s/ Michael M. Christovich
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CERTIFICATE

This is to certify that a copy of the above and foregoing has been served upon counsel of record by depositing same in the United States Mail, postage prepaid, this 19th day of November, 1991, at New Orleans, Louisiana.

/s/ Michael M. Christovich
MICHAEL M. CHRISTOVICH

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-3144

JOHN DOE, Plaintiff/Appellee

vs.

STATE OF LOUISIANA, DEPARTMENT OF HEALTH & HUMAN SERVICES, OFFICE OF COMMUNITY SERVICES, *et al.*,
Defendants/Appellants

MOTION FOR LEAVE TO SUPPLEMENT COMPLAINT

(Filed Oct. 18, 1993)

Plaintiff/Appellee, pursuant to Fed.R.Civ.P. 15(d) and FRAP 27, respectfully moves to supplement his Amended Complaint by adding thereto the following supplemental allegations of specific fact unknown to complainant as of the date of his Amended Complaint, November 19, 1991, *viz.*:

To Paragraph XX. add:

"On September 14, 1990 defendants George and Bennett knew the allegations of sexual abuse by Doe of his children were unsubstantiated, as indicated on their own OCS file and from reports received from Dr. Rebecca Russell and Dr. William Janzen. On the same September 14, 1990, George and Bennett, knowing there was no evidence of sexual abuse, referred the matter to the Jefferson Parish District Attorney's office for prosecution of Doe. Even though George had concluded in her own file

that the charges were unsubstantiated, she knowingly concealed her findings from the District Attorneys, Juvenile Court Judge McGee, and Judge Cusimano. Defendants' conduct was objectively unreasonable and outrageous, without any foundation in fact, and therefore violated clearly established Fourteenth Amendment substantive constitutional rights to family integrity and privacy of which a reasonable caseworker would have known."

To Paragraph XXVIII. add;

"George referred Doe's son to Dr. James Pramberg for the proctoscopic examination on November 5, 1990, knowing the son was not a victim of sexual abuse. Dr. Pramberg conducted the examination, drew blood from the son's penis to test for venereal disease, and then concluded that no sexual abuse had occurred. George's conduct was objectively unreasonable and outrageous, without any foundation in fact, and therefore violated clearly established Fourteenth Amendment substantive constitutional rights to privacy and bodily integrity of which a reasonable caseworker would have known."

A brief in support of plaintiff's motion is attached hereto.

WHEREFORE, it is respectfully moved that an order be entered herein remanding this matter to the district court to allow plaintiff to supplement his complaint as indicated.

Further, this Court should order that thereafter the appeal herein shall be considered upon the record as so supplemented.

Respectfully submitted,

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CERTIFICATE OF MAILING

This is to certify that a copy of the above and foregoing Motion for Leave to Supplement Complaint has been served upon all counsel of record by depositing same in the United States Mail, postage prepaid, this 18th day of October, 1993, at New Orleans, Louisiana.

/s/ Michael M. Christovich
MICHAEL M. CHRISTOVICH

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
No. 92-3144

JOHN DOE, Plaintiff/Appellee

vs.

STATE OF LOUISIANA, DEPARTMENT OF HEALTH & HUMAN SERVICES, OFFICE OF COMMUNITY SERVICES, *et al.*,
Defendants/Appellants

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO SUPPLEMENT COMPLAINT

(Filed Oct. 18, 1993)

Under *Anderson v. Creighton*, 438 U.S. 635, 107 S.Ct. 3034 (1987), plaintiff, in order to overcome the defense of qualified immunity, is obliged to plead with particularity clearly established constitutional rights that were violated by defendants' conduct. *Accord, Sisk v. Levings*, 868 F.2d 159, 161 (5th Cir. 1989); *Stem v. Ahearn*, 908 F.2d 1 (5th Cir. 1990). So too, plaintiff must allege with particularity that a reasonable person would have known that her conduct violated the constitutional rights at issue. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738 (1982). Our motion for leave to supplement plaintiff's amended complaint is aimed at meeting these heightened pleading requirements.

We respectfully submit that these specific supplemental factual allegations, which must be taken as true at the pleading stage, show a patent violation of Doe's

clearly established constitutional rights to be free from unwarranted and wholly unsubstantiated state intrusion into his family's integrity and his control and custody of his children of which a reasonable caseworker would have known.

Pursuing allegations of child abuse knowing them to be false and separating parent and child upon fabricated charges and concealed exculpatory evidence plainly deprives Doe of Fourteenth Amendment liberty interests without due process of law. *Vinson v. Campbell County Fiscal Court*, 820 F.2d 194, 200-01 (6th Cir. 1987).

At the time of George and Bennett's egregious conduct in this case, it was clearly established that parents have a constitutional right to family integrity and to be free from unwarranted and objectively unreasonable intrusion into the care and custody of their children. This, we submit, was the state of the law as of 1990 in those jurisdictions that had adopted the rule of qualified immunity for caseworkers in child abuse cases. *Austin v. Borel*, 830 F.2d 1356, 1363 (5th Cir. 1987); *Hordorowski v. Ray*, 844 F.2d 1210, 1217 (5th Cir. 1988); *Meyers v. Morris*, 810 F.2d 1437, 1463 (8th Cir. 1987); *Doe v. Hennepin County*, 858 F.2d 1325, 1329 (8th Cir. 1988); *Robison v. Via*, 821 F.2d 913, 922 (2nd Cir. 1987).

Any reasonable caseworker certainly would have known that knowingly pursuing false accusations of sexual abuse against an innocent parent would violate these clearly established constitutional rights.

Further, on November 5, 1990, when George referred Doe's son to Dr. James Pramberg for the proctoscopic examination, knowing the son was not a victim of sexual

abuse, the law was clearly established that bodily integrity and privacy are constitutionally protected liberty interests that cannot be invaded upon false pretenses, and that a reasonable caseworker would have known of such rights. *Winston v. Lee*, 470 U.S. 762, 105 S.Ct. 1611 (1985).

On these specific supplemental factual allegations, added to the "nightmarish" allegations already of record, we respectfully submit that the defense of qualified immunity fails.

Nor is it too late for Doe to file a motion to remand for the purpose of permitting plaintiff to file a supplemental pleading in the district court. "[T]he appellate court may remand a case pending before it for the purpose of permitting a party to file a supplemental pleading in the district court." 6A WRIGHT, MILLER, & KANE, FEDERAL PRACTICE AND PROCEDURE, Sec. 1509, p. 207 (1990). *Accord, Mathews v. Diaz*, 426 U.S. 67, 75 (1976); *Southern Pac. Co. v. Conway*, 115 F.2d 746, 750 (9th Cir. 1940). The new specific facts sought to be pleaded by Doe were unknown to him at the time he amended his complaint, November 19, 1991. They were discovered only upon George's depostion testimony. No prejudice to defendants, cognizable in law, can possibly arise from permitting plaintiff to plead these new facts concealed from him by defendants' own deceitful conduct.

CONCLUSION

For the foregoing reasons, this Court should remand this matter to the district court to permit plaintiff to supplement his complaint as indicated and order that

thereafter the appeal shall be considered upon the record as so supplemented.

Respectfully submitted,

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CERTIFICATE OF MAILING

This is to certify that a copy of the above and foregoing Brief in Support of Motion for Leave to Supplement Complaint has been served upon all counsel of record by depositing same in the United States Mail, postage prepaid, this 18th day of October, 1993, at New Orleans, Lousiana.

/s/ Michael M. Christovich
MICHAEL M. CHRISTOVICH

Supreme Court, U.S.
FILED
FEB 1 1994
OFFICE OF THE CLERK

No. 93-1083

In The

Supreme Court of the United States

October Term, 1993

JOHN DOE, individually and on behalf of his minor children,

Petitioner,

v.

PAULA BENNETT and SHERYL GEORGE,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

On August 6, 1990, a child abuse investigation was instituted by the Gretna, Louisiana branch of the Office of Community Services ("*OCS*"). Complaint, Paragraph VI, App. 60a.[1] The investigation was begun as a result of an examination by Dr. Richard Bagnetto and subsequent report to OCS of allegations of abuse. Amended Complaint, Paragraph XVIII, App. 67a. Pursuant to LSA-R.S. 14:403, et seq., OCS is required to investigate allegations of child abuse/neglect. Complaint, Paragraph VI, App. 60a.

The subsequent judicial proceedings over the next four months all occurred in the context of a state *civil* divorce/custody proceeding and a state *civil* juvenile proceeding. App. 15a. The results of the OCS investigation were reported to the District Attorney's office on September 14, 1990, and the District Attorney's office filed a child-in-need-of-care petition in civil juvenile court on or about September 25, 1990. The hearing or adjudication in the child-in-need-of-care proceeding was held by the State civil juvenile court judge on December 11, 1990, and the children were found not to be in need of care. Doe himself was never the subject of any criminal prosecution. App. 16a.

---

[1] Since the case below was dismissed on defendants' motion to dismiss under Fed.R.Civ.P. 12(b)(6), the only "facts" before the lower courts and now this Court were/are the allegations of the plaintiff in the Complaint and Amended Complaint. Defendants' references in this opposition are to plaintiff's appendices wherein those items and the opinions, judgments, and orders below are reproduced.

This suit (filed on April 5, 1991) was filed after the child-in-need-of-care proceeding was dismissed in December, 1990. The federal claims in this suit were brought under 42 U.S.C. § 1983. Plaintiff John Doe alleged he had a clearly established constitutional right consisting of a "liberty interest" in family integrity and/or in the care, custody and management of his minor children. Plaintiff also alleged garden variety state law tort claims for malicious prosecution.

Defendants raised immunity defenses under the Eleventh Amendment, and under the doctrines of absolute and qualified immunity. On November 12, 1991 three of the defendants were dismissed on the basis of Eleventh Amendment immunity. Plaintiff did not appeal, and that judgment is final.

The child protection caseworker and her supervisor remained as defendants. After plaintiff filed an Amended Complaint, the district court, on January 31, 1992, held that the two remaining defendants were not entitled to either absolute or qualified immunity. App. 37a-48a. The district court indicated that, although the court was aware "of the policy considerations involved in allowing plaintiff[ ] to proceed with those claims against defendants," App. 46a – that of unduly restricting the scope of child abuse investigations – and "the danger that litigation such as this case cause child protection service workers to shift their attention from protecting abused children to avoiding vexatious litigation, thus threatening the health and safety of abused children," App. 47a, nevertheless the defendants' actions as alleged in the Amended Complaint violate plaintiff's clearly established constitutional rights by violating plaintiff's "fundamental

liberty interest in Doe's care, custody, and management of Daughter and Son, as that liberty interest is protected by the Fourteenth Amendment." App. 45a.

On appeal to the Fifth Circuit, the issue actually briefed by both sides revolved around whether the district court had correctly found that there is a clearly established constitutional right of a parent in the "care, custody, and management" of his/her minor children. Defendants cited to the Fifth Circuit the recent decision of the First Circuit in *Frazier v. Bailey*, 957 F.2d 920 (1st Cir. 1992), a case which defendants believe is on all fours with their contention that there was/is no constitutionally protected "liberty interest" or other clearly established constitutional interest in the care, custody, and management of minor children. In their brief to the Fifth Circuit, plaintiff continued to argue that the constitutional right involved was a "liberty interest" in the care, custody, and management of Doe's children, a right plaintiffs contended is protected by the Fourteenth Amendment.

On October 5, 1992, the Fifth Circuit rendered its initial decision in this case. In that decision, the panel chose not to address whether a parent has a clearly established constitutional right in the care, custody, and management of his/her minor children. Instead, the panel decided that there was a clearly established constitutional right to be free from malicious prosecution: "John Doe's complaint does at least allege the violation of *one* clearly recognized constitutional right – the right to be free from bad faith and malicious prosecution." (emphasis added) App. 34a.

Under the initial Fifth Circuit decision, a claim of "malicious prosecution" standing alone would be sufficient to state a claim for a violation of a constitutional right under 42 U.S.C. § 1983. Moreover, since the alleged wrongful conduct all occurred in a *civil* context, the clear import of the Fifth Circuit's decision was that section 1983 actions could be brought based solely upon a claim of "malicious prosecution" which had occurred in an underlying *civil* proceeding. That issue had never even been briefed by the parties. And insofar as defendants were able to determine, prior to that decision no Circuit had extended/expanded section 1983 that far.

Defendants petitioned for rehearing and for rehearing en banc on the issue of whether malicious prosecution in an underlying *civil* proceeding by itself could form the basis for a constitutional tort under 42 U.S.C. § 1983. The Fifth Circuit granted defendants' petition for rehearing, vacated its initial decision, assigned a *new* panel to hear the case, and set the case down for oral argument. Oral argument was then held on March 2, 1993 before the new panel. At oral argument, the panel specifically requested that the parties address the case of *Albright v. Oliver*, 975 F.2d 343 (7th Cir. 1992), *cert. granted* ___ U.S. ___, 113 S.Ct. 1382, 122 L.Ed.2d 757 (1993). The Seventh Circuit had held that malicious prosecution alone could not provide the basis for a constitutional tort under 42 U.S.C § 1983. Unlike the instant case, the underlying proceeding in the *Albright* case arose in a *criminal* context.

On October 4, 1993, the new Fifth Circuit panel rendered its decision in this case. App. 1a-28a. The panel held there is no clearly established constitutional right of family integrity of which defendants would have known:

> Given the absence of more fact-specific law, and in light of *Hodorowski*, *Santosky* – both procedural due process cases – and *Frazier*, *we cannot conclude that the preexisting law establishes that George and Bennett should have known that their conduct violated the nebulous right of family integrity*. Therefore, as a matter of law, George and Bennett did not violate a constitutional right that was clearly established at the time of the alleged conduct.

(emphasis added) App. 13a-14a.

Likewise, the panel rejected the notion that there is a clearly established constitutional right to be free from malicious prosecution in a *civil* proceeding:

> We find no authority for and decline to hold that the mere possibility of criminal prosecution converts an otherwise civil proceeding into the equivalent of a criminal proceeding for purposes of determining whether a constitutional right was violated. . . . *Thus we must now determining whether and when a claim of malicious prosecution is actionable under § 1983 where the underlying proceeding was civil.*
>
> It is unclear when the tort of malicious prosecution states a claim for denial of civil rights under § 1983 where the malicious prosecution occurred in a civil proceeding.
>
> * * *
>
> [I]t can hardly be said that in light of the law in 1990 that the unlawfulness of George's and Bennett's conduct was apparent. Consequently, *'there was no clearly established constitutional*

> *counterpart to an action for malicious prosecution.'* (citation omitted).

(emphasis added) App. 16a-19a.

In her concurring opinion, Judge King stated:

> Specifically, I would hold that Bennett and George are entitled to qualified immunity because Doe has not asserted the violation of a constitutional right at all.

App. 21a.

The panel dismissed the federal claims, holding that defendants were entitled to *qualified immunity*. App. 20a.

SUMMARY OF ARGUMENT

Plaintiff offers three reasons why a writ should be granted. The first reason offered by plaintiff, his claim that there is a "clearly established" constitutional right to family integrity, is the only one which merits even passing consideration. The two Circuits to address this precise issue recently, the Fifth Circuit in this case and the First Circuit in *Frazier v. Bailey* in 1992, have rejected the argument that there is a constitutional right to family integrity because "an interest in family integrity 'must always be balanced against the governmental interest [in the health, education, and welfare of children as future citizens],' " which makes it "difficult, if not impossible, for officials to know when they have violated 'clearly established' law." This rationale, clearly expressed in the First Circuit's *Frazier* decision and adopted by the Fifth Circuit below, makes sense and this Court should not reconsider the

issue. Plaintiff also argues that a writ should be granted to determine whether malicious prosecution standing alone can form the basis for a constitutional tort under 42 U.S.C. § 1983. However, this Court has just rejected this argument in its decision in *Albright v. Oliver* on January 24, 1994. Finally, plaintiff argues that there is a split among the Circuits as to whether child protection case-workers are entitled to absolute immunity or the lesser protection of qualified immunity, and contends that is a reason for granting a writ in this case. However, since the Fifth Circuit is among the Circuits which apply the lesser protection of qualified immunity and since qualified immunity was actually applied in this case, resolution of the Circuit split could not possibly change the result below.

ARGUMENT

Plaintiff sets forth three reasons for granting a writ in this case. *See* Petition for Writ of Certiorari, at 22-28 (hereinafter "Writ").

Two of plaintiff's three reasons should be rejected out of hand. First, plaintiff argues for the granting of a writ on the basis that malicious prosecution standing alone should be enough to form the basis for a constitutional tort claim under 42 U.S.C. § 1983, and also argues that *Albright v. Oliver*, No. 92-833, pending before this Court might require reversal of the Fifth Circuit's rejection of *civil* malicious prosecution as a sole basis for a constitutional tort claim under 42 U.S.C. Section 1983. *See* Writ, at 24. However, this Court just handed down its decision in

Albright last week. *Albright v. Oliver,* 62 U.S.L.W. 4078 (U.S. Jan. 24, 1994). The Court affirmed the Seventh Circuit's rejection of malicious prosecution as a sole basis for a section 1983 action, and concluded that there must be some other constitutional underpinning, such as the Fourth Amendment, for the section 1983 action. In footnote 5 of the plurality opinion, this Court stated: "In view of our disposition of this case, it is evident that *substantive due process may not furnish the constitutional peg* on which to hang such a 'tort'." (emphasis added) *Id.* at 4079 n.5. Thus, *Albright* requires denial of plaintiff's writ application since plaintiff's claim of malicious prosecution in an underlying civil proceeding does not have any separate constitutional underpinning.

Second, plaintiff argues for the granting of a writ on the basis that a conflict exists among the Circuits as to whether child protection caseworkers such as defendants are protected by absolute or only qualified immunity. *See* Writ, at 25-28. There is no reason to address any such Circuit split in this case since the Fifth Circuit is among the Circuits which only afford qualified immunity to child-protection caseworkers and qualified immunity is all that was afforded to defendants in this case. (App. 20a). Therefore, resolution of the Circuit split could not possibly change the result below.

The only reason advanced by plaintiff for the granting of a writ which merits even passing consideration should likewise be rejected. Plaintiff argues that a "clearly established" liberty interest in family integrity and/or in the care, management and control of Doe's minor children existed at the time of defendants' alleged

wrongful conduct. The two Circuits to address this precise issue recently, the Fifth Circuit below and the First Circuit in *Frazier v. Bailey*, 957 F.2d 920, 929-31 (1st Cir. 1992), have held that no such "clearly established" constitutional right exists. The Fifth Circuit in its opinion below, App. 10a-14a, essentially adopted the rationale expressed by the First Circuit in *Frazier* that no clearly established constitutional right to family integrity can exist because "an interest in family integrity 'must always be balanced against the governmental interest [in the health, education, and welfare of children as future citizens],' " which makes it "difficult, if not impossible, for officials to know when they have violated 'clearly established' law." App. 13a. This rationale makes sense and this Court should not reconsider the issue.

CONCLUSION

Considering the decision of the Fifth Circuit on October 4, 1993, the record in this case, and the applicable law, defendants respectfully submit that the Fifth Circuit's dismissal of plaintiff's claims under 42 U.S.C. § 1983 was correct, and therefore the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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